APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-886

THE UPJOHN COMPANY, ET AL.,
Petitioners

—*v.*—

THE UNITED STATES, ET AL.,
Respondents

On Writ of Certiorari to the Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI FILED DECEMBER 7, 1979
CERTIORARI GRANTED MARCH 17, 1980

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UNITED STATES DISTRICT COURT
FOR THE SIXTH CIRCUIT

RECORD ON APPEAL

I, Gerald H. Liefer, Clerk of the United States District Court for the Western District of Michigan, do hereby certify that the annexed documents consisting of 1 volume(s) of pleadings, 1 volume(s) of transcript, and 0 volume(s) of depositions constitute the Record on Appeal and Relevant Docket Entries in the below captioned case.

Title of Case

UNITED STATES OF AMERICA and DAVID E. NOWAK,
Special Agent, Internal Revenue Service, *Appellee*

VS

UPJOHN COMPANY and GERARD THOMAS,
Vice President & Secretary, *Appellant*

Counsel for Appellant—(See Docket Sheet for additional Attorneys)
Name—Wallson G. Knack
Firm Name—Warner, Norcross & Judd
Address—900 Old Kent Bldg., Grand Rapids, Mich. 49503
Tele. No.—(616) 459-6121
SSN—

Counsel for Appellee

Name—James S. Brady
Firm Name—United States Attorney
Address—544 Federal Building, Grand Rapids, Michigan 49503
Tele. No.—(616) 456-2404
SSN—

District Judge: Hon. Noel P. Fox, Chief Judge
District Court Docket No. K77-7 Misc.
Date of entry of Judgment: May 15, 1978
Evidentiary Hearing Held: Yes ☐ No ☒
Transcript Included? Yes ☒ No ☐
Exhibits Included? Yes ☐ No ☒
Plaintiff Exhibits Nos.:
Defendant Exhibits Nos.:

If Habeas Corpus, was Certificate of Probable Cause
granted ☐
denied ☐

Nature of the Case: Petition to enforce IRS summons

Notices of Appeal:

Name of Party Filing Notice—Upjohn Company
Date Filed—5-25-78
I F P—Yes ☐ No ☒
Docket Fee Attached—Yes ☒ No ☐
Last Name of Counsel—Knack
Was Counsel Rtn'd ☒ Appt'd ☐

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of this Court at Grand Rapids, Mich. and have transmitted the above record to the Court of Appeals, this 27th day of June, 1978.

/s/ GERALD H. LIEFER

Gerald H. Liefer
Clerk

Dist/Office—646 1
Docket Yr.—77
Docket Number—0007
Filing Date—Mo. Day Year—08 31 77
J N/S O R—Miscellaneous
Judge Number—4604
Docket Yr. Number—K77 Misc. 0007

Plaintiffs

UNITED STATES OF AMERICA and DAVID E. NOWAK

Defendants

UPJOHN COMPANY and GERARD THOMAS,
Vice President and Secretary

Cause

June 29 1978

Petition to Enforce Internal Revenue Service Summons

mh

Attorneys

For the United States

James S. Brady
United States Attorney
544 Federal Building
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(616) 372-2404

Jerome Fink, Attorney #6
Tax Division
Department of Justice
Washington, D. C. 20530

For Defts.

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Warner, Norcross & Judd
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459-6121

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202-785-1234

Charles McNelis
Welch & Morgan
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900 Seventeenth Street, N.W.
Washington D.C. 20006
202-296-5151

Filing Fees Paid

Date—5-30-78
Receipt Number—Warner, Norcross (Appeal) $255.00
C.D. Number—#33220
#33218

U.S.A. & David E. Nowak

v.

Upjohn Company and Gerard Thomas, Vice P

Proceedings

1977 — Nr.

Aug 31—1—Filed petition to Enforce Internal Revenue Service Summons with exhibit 1 and affidavit of David E. Nowak attached

Aug 31—2—Filed Order to Show Cause hearing 9-26-77 before Stephen W. Karr at 1:30 p.m.; written response required w/in 15 days after service

Aug 31—Summons issued and delivered to U.S. Marshal

Sep 14—3—Filed Appearance of Atty. Wallson G. Knack, R. Roberts & C. McNelis on behalf of defts.

Sep 16—4—Filed Response by respondents to petition to enforce Internal Revenue Service Summons w/certificate of service

Sep 15—5—Filed Marshal's return showing service upon Gerard Thomas as UNEXECUTED; (on vacation) showing service upon Upjohn Co. via Mary R. Welch, Ass't Corp. Sect. on 9-01-77

Oct 5—6—Filed pltfs' opposition to respondents' motion to expedite discovery and accompanying interrogatories and motion to produce with cert. of service

Oct 6—7—Filed defts motion to expedite discovery and cert of service

Oct 6—8—Filed defts motion to produce with cert of service

Oct 6—9—Filed notice of hearing on motion to expedite discovery

Oct 6—10—Filed defts interrogatories to U.S. with cert of service

Oct 6—11—Filed affidavit of service for pleadings 7 and 9

Oct 7—12—Filed Defts' Opposition and Motion to Dismiss Petition to Enforce Internal Revenue Summons with certificate of service

Oct 7—13—Filed BRIEF in Support of Opposition and Motion to Dismiss (pldg #12) with certificate of service

Oct 7—14—Filed Affidavit of Gerard Thomas w/exhibits 1, 2, 3 & 4 attached

Oct 11—15—Filed petitioners' brief in support of their petition to enforce an internal revenue service summons w/cert. of service

Oct 11—16—Filed Respondent's response to Government's opposition to motion to expedite discovery w/cert. of service

Dec 5—17—Filed respondent's brief in support of opposition and motion to dismiss petition to enforce internal revenue summons w/certificate of service

Dec 5—18—Filed Respondents' proposed findings of fact w/certificate of service

Dec 5—19—Filed petitioners' Post Hearing Brief in support of their Petition to enforce an Internal Revenue Summons w/certificate of service

Dec 13—20—Filed Petitioners' Reply Brief w/certificate of service

Dec 15—21—Filed Reply of Respondents to Petitioners' Post Hearing Brief with certificate of service

Nov 8—21a—Filed proceedings held 10-12-77 at G.R. before Mag. Karr with exhibits

1978

Feb 23—22—Filed Report and Recommendation of Magistrate that order be entered compelling respondents to comply

Feb 24—23—Filed letter of Mag. showing proof of mailing of report & recommendation to attys Brady, Fink, Knack, Roberts & McNelis

Mar 3—24—Filed respondents' motion for extension of time to file Objections to Recommendation of the U.S. Magistrate w/ORDER extending time to file to on or before March 10, 1978

Mar 6—Copies mailed to W. Knack, U.S. Atty., J. Fink, R. Robers, & C. McNeils

Mar 8—25—Filed respondents' motion for reconsideration and objection to Report and Recommendation of Magistrate

Mar 8—26—Filed Brief in support of respondents' motion for Reconsideration and Objection to Report & Recommendation of Magistrate w/attachment

Mar 23—27—Filed Petitioners' Response to the Respondents' Objection to report and Recommendation of Magistrate w/certificate of service

Mar 23—28—Filed letter from Magistrate Karr addressed to Judge Fox which is extending the time for filing objections to the Report & Recommendation to 3-17-78 (copies were mailed to all counsel via Magistrate Karr's Office)

Mar 23—29—Filed letter from Magistrate Karr addressed to Judge Fox in response to Respondents' motion for Reconsideration & Objection to Report and Recommendation (copies mailed by Magistrate Karr's Office)

Mar 28—30—Filed ORDER Accepting Magistrate's Report and Recommendation entered 2-28-78

Mar 28—30—Copies of order (pldg #30) mailed to attys Fink, Knack, Roberts, McNelis and given to U.S. atty

May 16—31—Filed ORDER and Final Judgment that respondents to obey summons serv 11-23-77 by testifying and producing documents on 5-30-78 at 9:00 a.m. in Kalamazoo, MI

May 25—32—Filed Respondents' Motion for Stay Pending Appeal, with attached Certificate of Service

May 25—33—Filed ORDER staying Order and Final Judgment entered 5-15-78 pending Mandate of Court of Appeals

May 25—Copy of Order mailed to Attys. Roberts, McNelis, Fink & Brady 4j

May 25—34—Filed Respondent Upjohn Company's *Notice of Appeal* from Order of May 15, 1978, with attached Certificate of Service

May 25—Copy of Notice of Appeal given to Attys. Roberts, McNelis, Fink & Brady

May 25—35—Filed Respondents Designation of Contents of Record and Statement of Points, with attached Certificate of Service

June 1—Copy of Notice of Appeal given to Judge & Ct. Reporters

June 1—Copy of Notice of Appeal and copy of docket sheet mailed to Ct. of Ap.

June 27—Mailed record on appeal (circled pleadings) to Court of Appeals with certificate of record on appeal and copy of docket entries

June 27—Mailed copy of certificate of record on appeal and docket entries to Attys. Brady, Fink, Knack, Roberts & McNelis

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Appeal From Western District of Michigan, S.D. at Grand Rapids

GENERAL DOCKET

Case No. 78-1277

Title of Case

UNITED STATES OF AMERICA and DAVID E. NOWAK, IRS, *Petitioners-Appellees,*

vs.

THE UPJOHN COMPANY and GERALD THOMAS in his official capacity, *Respondents-Appellants.*

(Fed. Ques.) Internal Revenue Code/summons

No. below: K77-7 Misc CA
Judge below: Fox
Date of Judgment: May 16, 1978
Notice of appeal filed: May 25, 1978

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Assistant Attorney General
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Gilbert E. Andrews
202-739-5193
Crombie Garrett, R. Bruce Johnson

Date—Account of Appellant

6/30/78—Warner, Norcross & Judd #17241 74-5/724

Received 50.00

Remarks—Certified record returned to District Court 9/17/79

June 30, 1978—Treasurer of U.S.—Acc't Fees Earned Disbursed 50.00

Filings—Proceedings

Date

1978

5/30—Copy of Notice of Appeal

6/30—*Certified Record* (1 vol. pleadings and 1 vol. transcript) filed and cause docketed

7/10—Appearance of C. McNelis for appellant

7/10—Appearance of W. Knack for appellant

7/17—Appearance of M. Ferguson and G. Andrews for appellees

8/11—Appearance of R. Roberts for appellant, Gerald Thomas

8/11—Brief (25) of appellant (m-8/9)

8/11—Joint appendix (10) (m-8/9)

8/18—Appearance of W. Knack for appellant

8/18—Appearance of C. McNelis for appellant

9/5—Motion: appellee's brief to 10/8/78 (m-9/1) (Ext. to 10/8/78 granted JPH 9/6)

10/12—Appearance of C. Garrett and R. Johnson for appellee

10/12—Brief (25) of appellees (m-10/10)

10/26—Reply brief (25) of appellant (m-10/24) Substituted by brief of 10/30

10/30—Reply brief (25) of appellant (m-10/26) Replacement copies of brief for brief filed 10/26

11/30—Motion of appellee to expedite appeal (m-11/24)

12/6—Reply of appellant to motion of appellees to expedite (m-12/5)

1979

1/10—Order granting appellee's motion and directing that this case be set for oral argument at the earliest practicable date (Peck, J.)

2/21—Cause argued by R. M. Roberts for Appellant, by J. Fink for Appellee and case submitted to the Court (Before: Celebrezze, Keith and Merritt, JJ.)

3/7—Additional citations of appellee (m-3/2)

5/24—Additional citations of appellant (m-5/23)

6/13—Additional citations of appellant (m-6/11)

6/28—Judgment of the District Court affirmed in part, reversed in part and case remanded for further proceedings

6/28—Opinion by Merritt, J.

7/12—Petition (15) for rehearing en banc (m-7/12)

9/10—Order denying petition for rehearing (Celebrezze, Keith and Merritt, JJ.)

9/17—Mandate issued (No costs taxed)

9/17—Opinion with mandate

12/14—Notice of filing petition for certiorari 12/7/79 (Sup. Ct.No. 79-886)

1980

3/20—Certified copy of order of Supreme Court granting certiorari 3/17/80

[Filed: August 31, 1977]

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CIVIL ACTION NO.

UNITED STATES OF AMERICA and DAVID E. NOWAK,
Special Agent, Internal Revenue Service,
Petitioners

v.

UPJOHN COMPANY and GERARD THOMAS,
Vice President and Secretary,
Respondents

PETITION TO ENFORCE INTERNAL REVENUE SERVICE SUMMONS

Now come the United States of America and Special Agent David E. Nowak, Internal Revenue Service, by their attorney, Frank S. Spies, United States Attorney for the Western District of Michigan, and show unto this Court as follows:

I

This is a proceeding brought under the authority of Sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954, 26 U.S.C. §§ 7402(b) and 7604(a), to judicially enforce an Internal Revenue Service summons.

II

The petitioner, David E. Nowak, is a special agent of the Internal Revenue Service employed in Detroit, Michigan, as is Special Agent James M. Rogowski. Special agents of the Intelligence Division are authorized to utilize In-

ternal Revenue Service summonses issued under the authority of Section 7602 of the Internal Revenue Code of 1954, 26 U.S.C. § 7602, and Treasury Regulations § 301.7602-1, 26 C.F.R. § 301.7602-1.

III

The respondent, Upjohn Company, is a Delaware corporation with offices at 7000 Portage Road, Kalamazoo, Michigan 49001, and doing business within the jurisdiction of this Court. The respondent, Gerard Thomas, is Vice President and Secretary of the respondent, Upjohn Company, also with offices at 7000 Portage Road, Kalamazoo, Michigan 49001.

IV

The petitioner, Special Agent David E. Nowak, is conducting an investigation of the federal income tax liabilities of Upjohn Company and its subsidiaries for the calendar years 1972, 1973 and 1974. This investigation was previously assigned to Special Agent James M. Rogowski.

V

The taxpayer, Upjohn Company, assigned its Vice President and Secretary, Gerard Thomas, to conduct an internal investigation of payments made by or on behalf of officials of the company and its subsidiaries to foreign officials. In conducting this internal investigation on behalf of Upjohn Company the respondent, Gerard Thomas acquired books, records, papers and other data and created investigative files, all of which relate to the tax liabilities under investigation by Special Agent David E. Nowak as described in paragraph IV, above.

VI

On November 23, 1976, a summons was issued by Special Agent James M. Rogowski directing the respondents, Upjohn Company and Gerard Thomas, Vice President and Secretary, to appear before Special Agent James M. Rogowski, on December 7, 1976, at 11:30 a.m., to testify and to produce for examination certain books, records and papers, all as set forth in the attached affidavit and summons. An attested copy of the summons was personally served upon the respondents, Upjohn Company and Gerard Thomas, Vice President and Secretary, by Special Agent Richard Vervisch on November 23, 1976, by handing it to Gerard Thomas. The summons issued to the respondents, Upjohn Company and Gerard Thomas, Vice President and Secretary, is attached hereto and incorporated herein as Exhibit 1.

VII

The respondents, Upjohn Company and Gerard Thomas, Vice President and Secretary, appeared before the petitioner, Special Agent David E. Nowak, and Special Agents James M. Rogowski and Joseph R. Lubbe, but refused to testify or to produce the books, records and papers required by the summons issued to them and described in paragraph VI, above, and such refusal has continued to the date of this petition.

VIII

The testimony and records sought by the summons issued to the respondents, Upjohn Company and Gerard Thomas, Vice President and Secretary, are not already in the possession of the Internal Revenue Service and no recommendation for prosecution of the taxpayer has been made to the United States Department of Justice.

IX

It was and now is essential to the determination of the federal tax liabilities of the taxpayers, Upjohn Company and its subsidiaries, for the years 1972, 1973 and 1974, that the respondents, Upjohn Company and Gerard Thomas, Vice President and Secretary, be required to testify and to produce the records demanded, as is evidenced by the affidavit of the petitioner, Special Agent David E. Nowak, attached hereto and incorporated herein as part of this application.

WHEREFORE, the petitioners respectfully pray:

1. That this Court enter an order directing the respondents, Upjohn Company and Gerard Thomas, Vice President and Secretary, to show cause, if any they have, why they should not comply with and obey the aforementioned summons and each and every requirement thereof.

2. That the Court enter an order directing the respondents, Upjohn Company and Gerard Thomas, Vice President and Secretary, to obey the aforementioned summons and each and every requirement thereof, and ordering their attendance and testimony and the production of the books, records and papers as required and called for by the terms of the summons before Special Agent David E. Nowak, or any proper officer of the Internal Revenue Service, at such time as may hereafter be fixed by Special Agent David E. Nowak, or any proper officer of the Internal Revenue Service.

3. That the United States recover its costs in maintaining this action.

4. That the Court render such other and further relief as is just and proper.

FRANK S. SPIES
United States Attorney

"EXHIBIT 1"

SUMMONS

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE

In the matter of the tax liability of
THE UPJOHN COMPANY
7000 Portage Road
Kalamazoo, Michigan 49001
Internal Revenue District of Detroit
Period(s) 1972, 1973, 1974

The Commissioner of Internal Revenue

To Gerard Thomas, Vice President and Secretary
The Upjohn Company
At 7000 Portage Road, Kalamazoo, Michigan 49001

Greetings: You are hereby summoned and required to appear before James M. Rogowski, an officer of the Internal Revenue Service, to give testimony relating to the tax liability or the collection of the tax liability of the above named person for the period(s) designated and to bring with you and produce for examination the following books, records, and papers at the place and time hereinafter set forth.

The following records of the Upjohn Company:

All files relative to the investigation conducted under the supervision of Gerard Thomas to identify payments to employees of foreign governments and any political contributions made by the Upjohn Company or any of its affiliates since January 1, 1971 and to determine whether any funds of the Upjohn Company had been improperly accounted for on the corporate books during the same period.

The records should include but not be limited to written questionnaires sent to managers of the Upjohn Company's foreign affiliates, and memorandums or notes of the interviews conducted in the United States and abroad with officers and employees of the Upjohn Company and its subsidiaries.

Place and time for appearance:

at Federal Building, 410 W. Michigan Avenue, Kalamazoo, MI 49005, Rm. B-41 on the 7th day of December, 1976 at 11:30 o'clock A.M.

Failure to comply with this summons will render you liable to proceedings in the district court of the United States or before a United States commissioner or magistrate to enforce obedience to the requirements of this summons, and to punish default or disobedience.

Issued under authority of the Internal Revenue Code this 23rd day of November, 1976.

Original

JAMES ROGOWSKI, Special Agent

Signature, Title Form 2039 (Rev. 2-74)

Authorized By: JOSEPH R. GUDDE, Group Manager
Signature, Title

Prior Authorization Received From:

Name, Title

On

Date Signature Issuing Officer

"EXHIBIT 1"

CERTIFICATE OF SERVICE OF SUMMONS

(Pursuant to Section 7603, Internal Revenue Code)

I certify that I served the summons shown on the front of this form on:

Date—November 23, 1976. Time—11:45 a.m.
How Summons Was Served:

☒ I handed an attested copy of the summons to the person to whom it was directed.
GERARD THOMAS

☐ I left an attested copy of the summons with the following person at the last and usual place of abode of the person to whom it was directed.

RICHARD C. VERVISCH, Special Agent
Signature, Title

Sec. 7603—Service of Summons

A summons issued under section 6420(e)(2), 6421(f)(2), 6424(d)(2), 6427(e)(2), or 7602 shall be served by the Secretary or his delegate, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CIVIL ACTION No.

UNITED STATES OF AMERICA and DAVID E. NOWAK,
Special Agent, Internal Revenue Service,
Petitioners

v.

UPJOHN COMPANY and GERARD THOMAS,
Vice President and Secretary,
Respondents

AFFIDAVIT

DAVID E. NOWAK, a petitioner herein, being first duly sworn, deposes and says:

1. I am a duly commissioned special agent of the Intelligence Division of the Internal Revenue Service with post of duty in Detroit, Michigan, and performing my duties under the District Director of Internal Revenue, Detroit, Michigan.

2. In my capacity as a special agent I was assigned to investigate the federal tax liabilities of Upjohn Company, 7000 Portage Road, Kalamazoo, Michigan 49001, and its subsidiaries, for the calendar years 1972, 1973 and 1974. The investigation was previously assigned to Special Agent James M. Rogowski.

3. The taxpayer, Upjohn Company, assigned its Vice President and Secretary, Gerard Thomas, to conduct an internal investigation of payments made by or on behalf of officials of the company and its subsidiaries to foreign officials. In conducting this investigation on behalf of Upjohn Company, Gerard Thomas acquired books, records and papers and other data, and created investigative files, all of which relate to the investigation of the federal tax liabilities of Upjohn Company and its subsidiaries.

4. Pursuant to such investigation and in accordance with Sections 7602 and 7603 of the Internal Revenue Code of

1954, 26 U.S.C. §§ 7602 and 7603, a summons, Treasury Form 2039, was served upon Upjohn Company and Gerard Thomas, Vice President and Secretary on November 23, 1976, by Special Agent Richard Vervisch personally handing an attested copy to Gerard Thomas. That summons, which is attached hereto as Exhibit 1 to this application and made a part hereof, directed Upjohn Company and Gerard Thomas, Vice President and Secretary, to appear before Special Agent James M. Rogowski on December 7, 1976, at 11:30 a.m., at Room B-41, Federal Building, 410 West Michigan Avenue, Kalamazoo, Michigan 49005, then and there to give testimony and to produce books, records and papers relating to the federal tax liabilities of Upjohn Company for the years 1972, 1973 and 1974.

5. The respondents, Upjohn Company and Gerard Thomas, Vice President and Secretary, appeared but refused to testify or produce the books, records and papers required by the summons issued to them, and such refusal has continued to the date of this affidavit.

6. The testimony and books, records and papers sought by the summons issued to Upjohn Company and Gerard Thomas, Vice President and Secretary, are not already in the possession of the Internal Revenue Service, and no recommendation for prosecution of the taxpayer has been made to the United States Department of Justice.

7. The testimony and books, records and papers demanded by the summons served upon Upjohn Company and Gerard Thomas, Vice President and Secretary, are necessary for the determination of the federal tax liabilities of Upjohn Company and its subsidiaries for the years 1972, 1973 and 1974.

DAVID E. NOWAK, Special Agent
Intelligence Division
Internal Revenue Service

Subscribed and sworn to before me this .... day of ....., 1977.

Notary Public

My commission expires: .....

[Filed: August 31, 1977]

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CIVIL ACTION NO.

UNITED STATES OF AMERICA and DAVID E. NOWAK,
Special Agent, Internal Revenue Service,
Petitioners

v.

UPJOHN COMPANY and GERARD THOMAS,
Vice President and Secretary,
Respondents

ORDER TO SHOW CAUSE

Upon the petition, the exhibit attached thereto, the affidavit of Special Agent David E. Nowak, Internal Revenue Service, and upon the motion of Frank S. Spies, United States Attorney for the Western District of Michigan, it is

ORDERED that Upjohn Company and Gerard Thomas, Vice President and Secretary, appear before the United States District Court for the Western District of Michigan, Southern Division, in that branch thereof presided over by the undersigned on the ..... day of ....., 1977, at ..... to show cause why they should not be compelled to obey the Internal Revenue Service summons served upon them on November 23, 1976. It is further

ORDERED that a copy of this Order, together with the petition and exhibit thereto, be personally served upon Upjohn Company and Gerard Thomas, Vice President and Secretary, on or before ....., 1977. It is further

ORDERED that Upjohn Company and Gerard Thomas, Vice President and Secretary, shall file a written response to the petition within five (5) days after service of the petition upon them.

Dated at ....., Michigan, this ..... day of ....., 1977.

United States District Judge

[Filed: September 16, 1977]

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. K77-5 Misc.

UNITED STATES OF AMERICA and DAVID E. NOWAK,
Special Agent, Internal Revenue Service,
Petitioners

v.

UPJOHN COMPANY and GERARD THOMAS,
Vice President and Secretary,
Respondents

RESPONSE TO PETITION TO ENFORCE INTERNAL REVENUE SERVICE SUMMONS

Respondents, the Upjohn Company and Gerard Thomas, by their respective attorneys, pursuant to the Order issued by this Court on August 31, 1977, answer the Petition of Special Agent David E. Nowak as follows:

Answer

Any allegations not specifically responded to herein are denied. Respondents further respond to the petition as follows:

1. Respondents admit the allegations contained in paragraph I;

2. Respondents admit the allegations contained in the first sentence of paragraph II and state that the second sentence of paragraph II sets out a legal conclusion to which no response is necessary;

3. Respondents admit the allegations contained in paragraph III and state that Gerard Thomas is a licensed attorney and is General Counsel to the Upjohn Company;

4. Respondents state that they do not have sufficient knowledge or information to form an opinion or belief

concerning the truth of the allegations contained in paragraph IV;

5. Respondents deny the allegations contained in paragraph V but state that Gerard Thomas, as General Counsel of the Upjohn Company, was asked to advise the Company about the legal consequences of payments which may have been made to employees of foreign governments or to third parties believed to be acting as intermediaries for such employees by the Company or by one or more of its affiliates. In his capacity as General Counsel, Mr. Thomas undertook an inquiry of the nature and extent of such payments;

6. Respondents admit the allegations contained in the first and second sentences of paragraph VI and admit that a copy of the summons issued to the respondents is attached to the petition but deny any allegations which may be incorporated in the petition by reference to the summons and not expressly set out in the petition;

7. Respondents admit the allegations contained in paragraph VII;

8. Respondents deny the allegations contained in paragraph VIII;

9. Respondents deny the allegations contained in paragraph IX;

Defenses

Respondents, in further response to the petition, hereinafter set forth the following defenses to compliance with the summons:

1. The documents demanded by the summons referred to in paragraph VI of the petition are privileged by reason of the Attorney-Client privilege and therefore are not lawfully subject to involuntary disclosure by the enforcement of a summons;

2. The documents demanded by the summons referred to in paragraph VI of the petition constitute the work product

of Gerard Thomas acting as attorney for the Upjohn Company and therefore are not lawfully subject to involuntary disclosure by enforcement of a summons;

3. The summons referred to in paragraph VI of the petition was not issued in good faith nor for any valid purpose within the scope of Section 7602 of the Internal Revenue Code of 1954, 26 U.S.C., and therefore compliance with the summons should not be enforced;

4. The summons referred to in paragraph VI of the petition is vague, overly broad, and requests documents which are already in the possession of the United States and which do not relate to the tax liability of the Upjohn Company.

Respectfully submitted,

Wallson G. Knack
900 Old Kent Building
One Vandenberg Center
Grand Rapids, Michigan 49502
Attorney for the Upjohn Company

Charles A. McNelis,
Attorney for the Upjohn Company

Richard M. Roberts,
Attorney for Gerard Thomas

CERTIFICATE OF SERVICE

The undersigned attorney states that a copy of the foregoing Response to Petition to Enforce Internal Revenue Service Summons was duly served on the United States by mailing, postage prepaid, to Frank S. Spies, United States Attorney for the Western District of Michigan, 544 Federal Building, Grand Rapids, Michigan 49503, on the 9th day of September, 1977.

Richard M. Roberts,
Attorney for Gerard Thomas

[Filed: October 7, 1977]

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. K77-5 Misc.

UNITED STATES OF AMERICA and DAVID E. NOWAK,
Special Agent, Internal Revenue Service,
Petitioner,

v.

THE UPJOHN COMPANY and GERARD THOMAS,
Vice President and Secretary,
Respondents,

AFFIDAVIT OF GERARD THOMAS

GERARD THOMAS, a respondent, being first duly sworn, deposes and says:

1. I am a duly licensed attorney in the States of Michigan and New York and, am employed as General Counsel by The Upjohn Company and its affiliated companies.

2. In January 1976, in my capacity as General Counsel, it came to my attention that certain payments might have been made by The Upjohn Company or its affiliates to employees of foreign governments or to third parties who may have been acting as agents for employees of foreign governments. My advice was requested concerning the legal effect which such payments would have.

3. I immediately conferred with attorneys in private practice who are experienced in tax matters and the requirements of the Securities and Exchange Commission, outside tax counsel and outside SEC counsel.

4. It was recognized that, in the event questionable payments had been made, there was a possibility that litigation

would be initiated by the shareholders or the SEC against the company or its officers and directors. It was also recognized that there was a possibility that criminal charges could be brought against the company or its officers or directors.

5. As a preliminary step to giving legal advice concerning such payments, it was recommended by outside counsel that I should conduct an inquiry into the nature and extent of such payments. This recommendation was made to R. T. Parfet, Jr., Chairman of the Board, and he directed me to conduct the inquiry.

6. My investigation was conducted for the following purposes:

a. To ascertain if any laws had been violated and, if so, the extent of any such violations;

b. To advise the corporation how business could be conducted to avoid the possibility of any questionable payments the future;

c. To advise the corporation on what disclosures, if any, should be made to governmental agencies and the manner and nature of any such disclosures;

d. To obtain information necessary for defense of any lawsuits or legal proceedings which might involve the Company or employees as a result of such disclosures.

7. The inquiry which I conducted with the assistance of outside counsel included interviews with 86 top level management officials of the Company and its affiliates. Interviews were conducted only with individuals who had overall supervisory responsibility for the expenditures of a particular branch, subsidiary, division or other operating unit of the Company or with individuals who were substantially concerned with such expenditures.

8. I made notes during these interviews. In some instances, there were follow-up interviews and telephone

conversations with some of the employees and notes were made of these. These notes and memoranda contain my mental impressions, conclusions and opinions.

9. A list of each of the persons interviewed is attached hereto as Exhibit 1.

10. Each of the persons interviewed was given a letter from R. T. Parfet, Jr., Chairman of the Board of The Upjohn Company, directing him to respond to me and advising him of the confidential nature of the inquiry. A copy of that letter is attached hereto as Exhibit 2.

11. As a part of my inquiry I also prepared a questionnaire with the assistance of outside counsel which was sent to the managers of the Company's 53 foreign affiliates. The questionnaire directed that each of the recipients treat my investigation and the information which it developed as "highly confidential." A copy of that questionnaire is attached hereto as Exhibit 3.

12. My notes of interviews and the questionnaire responses have been used exclusively by counsel of The Upjohn Company and have not been otherwise disclosed.

13. The objective of my inquiry was to identify payments which were considered "questionable", that is, payments which could have been made to officials or employees of foreign governments or to persons who might have been acting on behalf of such persons either directly or indirectly. Officials of the Company who were contacted were advised to interpret the inquiry broadly and to resolve any doubts in favor of including an item, even to the point of including an item where no Company records reflected the payment. In effect, my inquiry was not limited to uncovering payments which would be illegal or improper under the laws of a particular country or under the laws of the United States. There was also no attempt to limit the inquiry to payments which would constitute illegal bribes, kickbacks or other nondeductible payments under Section 162(c) of the Internal Revenue Code of 1954.

14. After it was determined that questionable payments had been made, the Company, in March of 1976, made a preliminary report to the Securities and Exchange Commission according to its Form 8-K which disclosed such questionable payments.

15. Contemporaneously, the same information was voluntarily disclosed to the Internal Revenue Service by sending to that organization a copy of the Form 8-K.

16. At the time that this disclosure was made, the Internal Revenue Service had concluded its regular audit of the 1972 and 1973 income tax returns of the Company. The civil tax liability of the Company had been finally determined and an IRS Form 870-C which reflected that liability for both years was executed by the Company and filed with the Internal Revenue Service. A copy of that form is attached hereto as Exhibit 4.

17. Subsequently, the Internal Revenue Service commenced a criminal investigation of the 1972, 1973 and 1974 income tax returns of the Company and Special Agents of the Intelligence Division contacted Company officials. Additionally, the Company was advised on February 23, 1977, that the Internal Revenue Service was opening up an investigation of the 1974 and 1975 Federal income tax returns and that Special Agents would supervise that investigation as well.

18. In July 1976, after more complete information was obtained, the Company filed with the S.E.C. an amendment to its Form 8-K for March, 1976, which disclosed additional questionable payments. It was also disclosed that some of these payments had been included in the U.S. consolidated income tax returns filed by the Company.

19. Contemporaneously, the same information was voluntarily disclosed to the Internal Revenue Service by sending to that organization a copy of the amendments to the Company's Form 8-K for March, 1976.

20. During the course of their investigation, the Special Agents were advised of the nature and extent of the investigation which I was conducting. They were provided with copies of invoices, vouchers, advices, cancelled checks and any other such documents which had been turned up by the Company during my investigation relating to all of the questionable payments made by foreign branches of United States subsidiaries of The Upjohn Company. Except in one instance, the Company did not attempt to obtain such information from foreign subsidiaries because the payments made by these corporations are not reflected on the U.S. income tax returns of the Company. In the only instance in which such information was obtained from a foreign subsidiary, that information was also turned over to the Special Agents. The books and records of the Company were made available to the Agents and on various occasions Company personnel worked with them to show the Agents the manner in which questionable payments were traced to the Company's U.S. tax returns. The Agents were provided with a list of persons interviewed by me or by outside counsel (Exhibit 1) and were advised that all persons still employed by the Company would be made available at his duty station for an interview by the Internal Revenue Service. The agents were also advised that, if any foreign-based officials came to the United States they would be made available for an interview at that time. The Agents were also provided with a copy of Mr. Parfet's letter regarding the confidential nature of my inquiry (Exhibit 2) and a copy of the questionnaire which was sent to the managers of the foreign affiliates of the Company. (Exhibit 3).

21. As of this date, Special Agents of the Internal Revenue Service have actually interviewed twenty of the individuals who were contacted either by me or by outside counsel during my investigation and they have expressed interest in interviewing another twenty-five of those in-

dividuals many of whom are in the United States and all of whom will be made available for an interview.

22. The Special Agents insisted that they be provided with my notes of interviews and the responses to the questionnaire. This demand was refused on the grounds that these documents were privileged communications of a client to an attorney, that they were the work product of an attorney, that they included material related to payments which did not affect the United States income tax returns of the Company and were otherwise irrelevant.

23. On November 23, 1976, Special Agent Rogowski issued the summons involved herein. On December 7, 1976, after consultation with outside counsel, I appeared before the Special Agents and again refused to produce my notes and the questionnaire responses on the grounds that such disclosures would violate the attorney-client privilege, the attorney work product rule and on the grounds that the documents requested included material relating to payments which do not affect the United States tax returns of the Company and which are otherwise irrelevant to the investigation of the 1972 through 1974 income tax returns of the Company.

Further, affiant saith not.

Gerard Thomas

Subscribed and sworn to before me on this ..... day of ....., 1977.

Notary Public

My Commission Expires: .....

EXHIBIT 1

[Filed with Affidavit of Gerard Thomas: October 7, 1977]

MEMO

To: D. E. Nowak

From: O. Thomas

Subject: Questionable Payments

Date: January 21, 1977

Copies To:

At our meeting in Detroit, you requested a list of the names and positions of the persons interviewed in the investigation of questionable payments. Attached is a list of the persons interviewed by me or by outside counsel during this investigation. If the employment of the person has terminated for any reason, the date of the termination is shown.

jc

att.

FOREIGN PAYMENTS INTERVIEW LIST

Name	Position*
James E. Beadle	Manager, International Accounting and Financial Reports
Michael G. Beck	Director, Commercial Division, International
Ray Bennett	Manager, Tax and Governmental Regulation Services, International (10/18/74)
Roberto Brenes	General Manager of Guatamala
R. R. Casler	General Manager of Hong Kong
Moacyr Castagna	Financial Controller of Brazil
Ronald J. Chambers	Group Vice Pres. Pacific Division
Robert W. Collins	Resources Planning Director
Kenneth R. Crawley	Medical Director, International Medical Planning
David S. Creamer	Manager, Corporate Tax Planning
Bernard Daum	Ag. Vet. Div. Mgr. South Africa
Carl H. Duisberg	Vice Pres. Central European Division
Keith H. Edmondson	Vice Pres. & General Mgr. for Chemical Division
Brian Ellis	General Manager, Near East District (stationed in Brussels, Belgium, N.V.)
Willi Ewald	General Manager & Vice Pres. of Japan

* Where employment has terminated, the termination date is indicated.

Name	Position*
Josue L. Faustino	General Manager of Philippines
Donald J. Fortman	Vice Pres., Business Development
Ce'sar Garza	General Manager, Asgrow Mexicana S.A.
Jack Gauntlet	Vice Pres. Corporate Development (4/14/70)
Jacques Gauthier	Vice Pres., France, Belgium & Holland Division
Jorge Gonzalez	General Manager of Spain
Harold Goodwin	Vice Pres. & Div. Mgr., Pacific South Division (stationed in Australia)
Nabil A. Habra	General Manager, Middle East District (stationed in Brussels)
E. T. E. Hansen	Manager, Market Development, Asgrow
David J. Harmelink	Manager, Marketing Research, International
Federico G. Hawkins	Manager of Panama
Sheldon Hedges	Product Manager, International
A. G. Holland	Manager, Financial Services, Polymer
W. N. Hubbard	President
Mario Iseppi	Presently in management training in Canada, previously General Manager in Hong Kong
Wolfgang Jacobi	General Manager in Germany

* Where employment has terminated, the termination date is indicated.

Name	Position*
Patrick Kennedy	Marketing Analyst II, Marketing Research, International
Vitaliano Kettlitz	Vice Pres. European South Div. (stationed in Italy)
John O. Korsten	General Manager, South Africa
Otto A. Kreuzer	Manager, International Health Regulatory Affairs
Edward J. Lee	Manager International Bid & Tender Negotiations
A. R. Lincoln	Group Manager, Corporate Taxes
Gerald V. Littig	Supervisory Unclassified
Lewis R. Long	General Manager in Mexico
C. H. Ludlow	Vice Pres. & Treasurer
John F. McIntyre	Secretary & International Counselor, UII
William P. McLauchlan	General Manager of Korea
John D. Martin	General Manager of The Upjohn Manufacturing Company
Donald C. Meitz	Director, Corporate Auditing & Office Methods & Procedures
Jorge A. Merigo	Vice Pres. Latin America, North Div., (stationed in Mexico)
Warren Miller	Executive Unclassified (5/31/76)
Harold E. Mill	Manager, East Africa Districts
Denzil K. Minkley	Office & Finance Manager, South Africa

* Where employment has terminated, the termination date is indicated.

Name	Position*
Jonas Mutashubilwa	District Sales Manager, East Africa District I
Willem C. Nolte	Sales Manager, South Africa
Anthony Obregon	Assistant Secretary, Upjohn S.A. de C.V.
Fernando Olazarri	General Manager of Brazil (1/77)
Roberto Ortega	Ag. Vet. Latin America, Area Manager, International
Jacques Ory	Administrative Manager, N.V. (stationed in Brussels)
David E. Osmun	Product Manager, International
P. S. Parish	Vice Chairman of the Board
Pier Paolo Partiseti	Area Manager for Italy, Yugoslavia, Greece
David A. Phillipson	Vice Pres. & General Manager for Ag. Div.
Neville Pritchard	General Manager of Thailand
Ray T. Parfet, Jr.	Chairman of the Board
Richard Rakow	Supervisor, Pharmaceutical Packaging
Henry Roberts	Vice Pres. & Sr. Training Consultant, UII (11/30/69)
John Rogstad	Vice Pres. Latin America South (stationed in Brazil)
Carlos A. Salvagni	General Manager in Argentina
Francis Santiago	Vice Pres., Latin America Div. II (stationed in Venezuela) (5/31/73)

* Where employment has terminated, the termination date is indicated.

Name	Position*
Thomas G. Schalk	Vice Pres. Ag. Vet. Div., International
Lee F. Seguin	Controller, International Financial Services
Eugene S. Shepherd	Vice Pres. & Treasurer, International
Alistar A. Smith	Vice Pres. Africa, Mid. East Div.
Kimon G. Softas	General Manager of Greece
Theo Stiftl	General Manager of Taiwan
Henry Suarez	General Manager of Colombia
W. E. Sykes	Group Vice Pres., Upjohn International
Richard D. Tedrow	Vice Pres. for International
Joao Teixeira	General Manager of Peru (7/31/76)
Donald D. Threlkeld	Director, Polymer Chemicals Marketing
Ronald Tobin	Group Vice Pres. Western Hemisphere
Harry J. Tomlinson	Supervisory Unclassified
Paolo B. Trambusti	General Manager, International Development, Asgrow
John VanLiere, Jr.	Manager, Administrative, Chemical Div.
W. J. VanderWalt	Manager, South African Breeding Station
R. R. Vermillion	Executive Vice President, Asgrow

* Where employment has terminated, the termination date is indicated.

Name	Position*
Selvi Vescovi	Group Vice Pres. European Div.
John B. Wilkinson	Attorney III, International
Daniel D. Witcher	Pres. Upjohn International, Inc.
Bryan O. Wright	Vice Pres. & Div. Manager, Pacific North Division (stationed in Japan)

CT:jc
1/21/77

* Where employment has terminated, the termination date is indicated.

EXHIBIT 2

[Filed with Affidavit of Gerard Thomas: October 7, 1977]

THE UPJOHN COMPANY
KALAMAZOO, MICHIGAN 49001

R. T. PARFET, JR.
Chairman of the Board

January 16, 1976

Dear

I have asked Gerard Thomas to investigate certain matters of particular concern to Corporate Management and to the Board of Directors. As chairman of the board and chief executive officer, I feel the subject must be thoroughly reviewed and have charged Gerard Thomas with that responsibility.

The subject matter must be treated as highly confidential and is not to be discussed with or disclosed to anyone other than Gerard Thomas or individuals he shall designate.

It is imperative that you be completely candid and cooperate fully in responding to questions and requests for information.

I appreciate your understanding of the importance of this matter and reemphasize the need for candid cooperation and confidentiality.

Very truly yours,

/s/ R. T. PARFET, JR.
R. T. Parfet, Jr.

RTP:jc

Resp. Exhibit No. 2—Date 10/12/77. Dep. Clk. L. G. R.

EXHIBIT 3

[Filed with Affidavit of Gerard Thomas:
October 7, 1977]

THE UPJOHN COMPANY
KALAMAZOO, MICHIGAN 49001

R. T. PARFET, JR.
Chairman of the Board

March 8, 1976

To All Foreign General and Area Managers:

In recent months, as you may be aware, it has been disclosed that several American companies, including some in the pharmaceutical industry, have made possibly illegal or improper payments to officials or employees of foreign governments and to others in connecton with foreign business. It has also been disclosed that, in order to conceal such payments, some companies have maintained "off the books" accounts or have entered such payments in accounts which inaccurately or inadequately describe the purpose for which a payment was made. I have decided that it is imperative that the management of this company has full knowledge of any payments such as those described above made by The Upjohn Company or any of its subsidiaries. To gather this information I am seeking your help.

I have asked Gerard Thomas, the company's General Counsel, to conduct an investigation for the purpose of determining the nature and magnitude of any payments made by The Upjohn Company or any of its subsidiaries to any employee or official of a foreign government from January 1, 1971 to the present. As an initial step in this investigation, I am asking that you and all other general managers of foreign subsidiaries provide us with full and complete responses to the following inquiries:

(1) Please provide any information which may be available within the subsidiary relating to the direct or indirect payment of funds under the Company's control to or for the benefit of any official or employee of a government agency or facility, including a hospital owned or operated by the government, during the period under investigation. Please schedule all such payments and describe in as much detail as you believe necessary the reasons for which each scheduled payment was made.

If a payment is less than $500 it is not necessary to schedule and describe it unless there are a series of payments to the same person which exceed $500 in one year. However, you should estimate the amount of money expended in each year for these lesser payments.

If you cannot absolutely establish that any payments of the types described above have been made, please provide also whatever information may be available within the subsidiary indicating that such payments might well have been made.

(2) Please provide any information that may be available within the subsidiary relating to any direct or indirect payment of funds under the Company's control to or for the benefit of any candidate for political office or any political party during the period under investigation. Please schedule all such payments and describe in as much detail as you believe necessary the reasons for which each such payment was made. If you cannot establish that any such payments were made, please provide whatever information may be available within the subsidiary indicating that such payments might have been made.

(3) Have any payments of funds under the Company's control been made by the subsidiary or any of its

employees which are not reflected on the subsidiary's official company financial and accounting books and records? If so, please provide all pertinent details. If you cannot establish that any such payments were made, please provide all information available within the subsidiary indicating that such payments might have been made.

(4) Have any third party payments been recorded on the official company financial and accounting books and records in accounts the purposes and descriptions of which do not accurately reflect the transactions? If so, please provide all pertinent details. If you cannot establish that any such entries have been made in your books, please provide all information available within the subsidiary indicating that such entries might have been made.

In considering your answers to each of these questions, you should interpret broadly any terms which you find ambiguous. For example: the term "payments" would include money payments, gifts or the payment of expenses such as those incurred for a weekend holiday or a vacation; an "indirect payment" would include payments to distributors or sales representatives all or part of which were or might well have been passed on to government officials or employees; and, as noted above, "official or employee" of a foreign government would include a person working at a hospital owned or operated by the government. As a general rule, any doubts you may have about providing particular information in response to any of the questions set forth above should be resolved in favor of providing the information.

I encourage you to discuss these questions with anyone in your subsidiary who you believe would be able to provide useful information. I also expect that you will have your files and accounting records reviewed to whatever extent you believe necessary in order to be reasonably certain that all relevant information has been provided. If you have

any questions regarding this matter, you should feel free to communicate directly with your management and with Gerard Thomas who has general responsibility for this investigation. In particular, if you will have difficulty in completing your response within one month you should cable Mr. Thomas.

This investigation and the information which it develops should be treated as highly confidential and not discussed with any persons other than those Upjohn employees who might be of assistance to you in providing the information requested. This matter should not be discussed with anyone not employed by the Company except our regularly retained public accounting firms and such persons as are specifically designated by Mr. Thomas. You should send your response to Gerard Thomas, Vice President and General Counsel, The Upjohn Company, 7000 Portage Road, Kalamazoo, Michigan 49001.

I recognize that in the past some employees may have engaged in practices which they believed were in the best interests of The Upjohn Company. However, in order that there be no uncertainty in the future as to the policy with respect to the practices which are the subject of this investigation, I have issued a detailed "Statement of Policy on Political Contributions, Payments to Government Personnel and Proper Accounting Practices." This statement is being disseminated to Upjohn employees worldwide. It will be your continuing responsibility to insure that all Upjohn employees under your supervision are aware of and comply with the rules set forth in this Statement.

I appreciate your understanding of the importance of this matter and reemphasize the need for candid cooperation and confidentiality. Thank you for your assistance.

Very truly yours,

/s/ R. T. Parfet, Jr.
R. T. Parfet, Jr.

RTP:jc

Resp. Exhibit No. 3—Date 10/12/77. Dep. Clk. L.G.R.

EXHIBIT 4

[Filed with Affidavit of Gerard Thomas:
October 7, 1977]

Department of the Treasury • Internal Revenue Service

Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment

Form 370-C
(Rev. May 1974)

Data received by Internal Revenue Service

I consent to the immediate assessment and collection of any deficiencies (increase in tax and penalties) and accept any overassessment (decrease in tax and penalties) shown below, plus any interest provided by law. I understand that by my signing this waiver, the corporation will not be able to contest these years in the United States Tax Court, unless additional deficiencies are determined for these years.

	Increase in Tax and Penalties	
Taxable year ended	Amount of tax	Penalty
1972	146,546.	———
1973	1,865,055.	———

Name and address of corporation—Number, street, city or town, State, ZIP code
The Upjohn Company and Subsidiaries
Kalamazoo, Michigan 49001

Signature	Title	Date
C. H. Ludlow	Vice President & Treasurer	3-4-76

The Internal Revenue Service does not require a seal on this form, but if one is used, please place it here.

NOTE: If you consent to the assessment of the deficiencies shown in this waiver, please sign and return the form in order to limit the interest charge and expedite our bill to you. Your consent will not prevent the corporation from filing a claim for refund (after it has paid the tax) if you later believe it is so entitled; nor prevent us from later determining, if necessary, that the corporation owes additional tax; nor extend the time provided by law for either action.

If the corporation later files a claim and the Service disallows it, the corporation may file suit for refund in a District Court or in the U.S. Court of Claims, but it may not file a petition with the United States Tax Court.

We will consider this waiver a valid claim for refund or credit of any overpayment due the corporation resulting from any decrease in tax and penalties determined by the Internal Revenue Service, shown above, provided this waiver is signed and filed within the period established by law for making such a claim.

Who Must Sign

The waived should be signed with the corporation name, followed by the signatures and titles of the corporate officers authorized to sign. An attorney or agent may sign this waiver provided his action is specifically authorized by a power of attorney which, if not previously filed, must accompany this form.

Form 870-C (Nov. 5-74)

[Filed: November 8, 1977]

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. K 77-7 Misc. CA

UNITED STATES OF AMERICA and DAVID E. NOWAK,
Special Agent, Internal Revenue Service,
Petitioners,

vs.

UPJOHN COMPANY and GERARD THOMAS,
Vice President and Secretary,
Respondents.

Before THE HONORABLE STEPHEN W. KARR, U.S. Magistrate.

**PROCEEDINGS ON PETITION TO ENFORCE
INTERNAL REVENUE SERVICE SUMMONS**

TIME: Wednesday, October 12, 1977

PLACE: Grand Rapids, Michigan

APPEARANCES:

MR. JEROME FINK, and
MR. ROBERT G. NATH
Tax Division
Department of Justice
Washington, D.C. 20530

and

FRANK S. SPIES, U.S. Attorney, by
HUGH W. BRENNEMAN, JR., Asst. U.S. Attorney
Federal Building
Grand Rapids, Michigan 49503

On behalf of the Petitioners;

HAMEL, PARK, MCCABE & SAUNDERS, by
MR. RICHARD M. ROBERTS
1776 F Street, N.W.
Washington, D.C. 20006

On behalf of Gerard Thomas;

WELCH & MORGAN, by
MR. CHARLES A. MCNELIS
300 Farragut Building
Washington, D.C. 20006

and

WARNER, NORCROSS & JUDD, by
MR. WALLSON G. KNACK
900 Old Kent Building
Grand Rapids, Michigan 49503

On behalf of Upjohn Company.

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WITNESSES:

Called by Petitioners	*Direct*	*Cross*	*Redirect*	*Recross*
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EXHIBITS:

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(*To be sent to Magistrate by Mr. Roberts)

Respondents'	*Id'd.*	*Offr'd.*	*Rec'd.*
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Affidavit of Gerard Thomas with Exhibits attached,		121	121
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(* Exhibits 4 and 5 to be sent to Magistrate by Mr. Knack and marked upon receipt and held under seal.)

Grand Rapids, Michigan
Wednesday, October 12, 1977
1:30 p.m.
Magistrate's Courtroom

PROCEEDINGS

The Magistrate: Do you want to tell me who is here, Mr. Brenneman?

Mr. Brenneman: Yes, your Honor, I would like to introduce two gentlemen who will be handling this case for the Department of Justice: Mr. Jerome Fink, on my far left; and assisting him will be Mr. Robert Nath.

The Magistrate: Fine. Thank you.

Mr. Knack: Your Honor, I would like to introduce Mr. Richard Roberts on my far right from the law firm of Hamel, Park, McCabe and Saunders in Washington. And seated next to me is Charles A. McNelis of the firm of Welch & Morgan. I would like to move their admission. They are both members of the Detroit Bar and members of the Supreme Court of the United States. They are here on behalf of Defendants Gerard Thomas and Upjohn Company.

The Magistrate: All right. The motion is granted. Welcome, gentlemen.

Mr. Fink: Thank you, your Honor.

The Magistrate: Let's see. That is Mr. Fink?

Mr. Fink: Yes.

The Magistrate: And Mr. Nath?

Mr. Nath: Yes, your Honor.

The Magistrate: Okay. I will keep everybody straight here. All right.

I guess this is an Order to Show Cause.

Mr. Fink: And we are the petitioners, your Honor.

The Magistrate: Do you want to start?

Mr. Fink: It would appear to me to be appropriate.

The Magistrate: All right. Go ahead.

Mr. Fink: I would like to start very briefly perhaps by reading into the record, although presumably it is already a part of the record, the admissions that have been made to our petition, so that we at least have a preliminary framework with which to begin.

I will read into the record, your Honor, only those allegations which have been definitely admitted by the Respondents.

The Magistrate: Very well.

Mr. Fink: This is a proceeding brought under the authority of Section 7402(b) and 7604(a) of the Internal Revenue Code of 1954, 26 U.S.C. and those sections thereafter, to judicially enforce an Internal Revenue Service summons.

The Petitioner, David E. Nowak, is a Special Agent of the Internal Revenue Service employed in Detroit, Michigan, as is Special Agent James M. Rogowski.

"The Respondent, Upjohn Company, is a Delaware Corporation with offices at 7000 Portage Road, Kalamazoo, Michigan, 49001, and doing business within the jurisdiction of this Court.

"The Respondent, Gerard Thomas, is Vice President and Secretary of the Respondent, Upjohn Company, also with offices at 7000 Portage Road, Kalamazoo, Michigan, 49001."

I might add that was admitted, your Honor. And they added: "And Gerard Thomas is a licensed attorney and is general counsel of Upjohn," something I will expect them to prove.

The Magistrate: Is there any dispute about that?

Mr. Fink: He has several offices, your Honor.

Mr. McNelis: Not from over at this side.

Mr. Fink: We will decide which hat he is wearing at the appropriate time.

The Magistrate: All right.

Mr. Fink: "On November 23, 1976, a summons was issued by Special Agent James M. Rogowski directing the Respondents, Upjohn Company and Gerard Thomas, Vice President and Secretary, to appear before Special Agent James M. Rogowski, on December 7, 1976, at 11:30 a.m., to testify and to produce for examination certain books, records, and papers, all as set forth in the attached affidavit and summons," a reference to the items which are attached to our petition, your Honor.

"An attested copy of the Summons was personally served upon the Respondents, Upjohn Company and Gerard Thomas, Vice President and Secretary, by Special Agent Richard Vervisch, V-e-r-v-i-s-c-h, on November 23, 1976, by handing it to Gerard Thomas."

The summons is attached, your Honor, to the Petition as Exhibit 1.

"The Respondents, Upjohn Company and Gerard Thomas, Vice President and Secretary, appeared before the Petitioner, Special Agent David E. Nowak and Special Agents James M. Rogowski and Joseph R. Lubbe, but refused to testify or to produce the books, records and papers required by the summons issued to them and described," says the Petitioner, "in paragraph VI above," which has been admitted, "and such refusal has continued to the date of this petition.

So, your Honor, I believe we have before us the fact that a petition—or, a summons was issued, duly served, no complaint as to the procedural aspect of the summons, but—in the sense of service, et cetera, but a complaint or a failure to respect to the summons as issued.

And I would like to call to the stand now Special Agent David E. Nowak, who is a petitioner in the cause.

The Magistrate: Mr. Nowak, would you come up here, please.

David E. Nowak,

a Petitioner herein, called as a witness on his own behalf, testified as follows:

Mr. Fink: Your Honor, is it your practice that we remain seated while we question?

The Magistrate: As you know, I have no preference.

Mr. Fink: No preference one way or the other. I guess at this time we are not wired for sound.

DIRECT EXAMINATION
BY MR. FINK:

Q. Mr. Nowak, you have stated your name, I believe, but for the record, would you state it in full, please?

A. David E. Nowak.

Q. Where are you employed, Mr. Nowak?

A. I am employed by the Internal Revenue Service in Detroit.

Q. And in what capacity?

A. I am a Special Agent with the Intelligence Division.

Q. And you work out of Detroit, is that correct?

A. That's correct.

Q. Briefly, sir, what was your education?

A. I have a Bachelor's Degree from Michigan State University. I majored in accounting, and I attended Wayne State University Law Schol for a year.

Q. What was the year of your graduation from Michigan State?

A. 1966.

Q. How long have you been employed as a Special Agent by the Internal Revenue Service?

A. Ten years.

Q. When were you assigned to the matter which is before us, the Upjohn Company investigation?

A. In December of 1976.

Q. In December of 1976?

A. Yes, sir.

Q. Have you been engaged in that investigation since that assignment?

A. Yes, sir.

Q. Down to date?

A. Yes, sir.

Q. Is it your sole assignment at this time?

A. It is.

Q. Have you been assisted in the course of this investigation by any revenue agents?

A. Yes, sir, I have.

Q. Throughout the course of the investigation, you have been assisted by revenue agents?

A. Yes, sir.

Q. Would you name the Revenue agents who have been assisting you?

A. Lewis Maurer, M-a-u-r-e-r; Frank Sherrod, S-h-e-r-r-o-d; Joseph Nemedi, N-e-m-e-d-i; Ed Ravesz—Edward Ravesz, R-a-v-e-s-z. There has been other agents assigned that specialize in employment taxes and some other areas. I don't recall their names. They assisted briefly.

Q. What years are being covered by your—were being covered by your investigation when you were first assigned?

A. The years under investigation were 1972, 1973, and 1974.

Q. Were you the Agent who issued the summons in question?

A. No, I was not.

Q. What was the name of the Agent who issued the Summons in question?

A. James Rogowski.

Q. Is he here in the courtroom?

A. Yes, he is.

Q. Did you learn on taking over this investigation, or subsequently, that the Upjohn Company is resisting producing the documents and other datum or data summoned by that Summons or called for by that Sommons?

A. Yes, sir.

Q. Did you learn that the Upjohn Company had disclosed to the Securities and Exchange Commission certain illegal bribes, kickbacks, et cetera, and other questionable payments that have been made, either by branches of the Upjohn Company or by their wholly owned or partially owned subsidiaries?

A. Yes, sir.

Q. Offhand, do you have in mind the amount of those questionable payments which the Upjohn Company has conceded to the Securities and Exchange Commission it did in fact or its affiliates did in fact pay?

A. I believe the total dollar amount that was finally arrived at was approximately 4.2 million dollars.

Q. Did you learn after taking over the investigation that the Upjohn Company agrees that at least some of these illegal payments or questionable payments have an impact on their domestic or federal income tax return?

A. Yes, sir.

Q. Incidentally, they file what type of income tax return for the years '72, '73, '74?

A. Well, they file many different types. Among those, they file a consolidated Federal Income Tax Return.

Q. And by consolidated return, we mean——

A. That consolidates the parent corporation and many of its subsidiary operations.

Q. But not all of its subsidiary operations?

A. Correct. And they file what is called a DISC Return. I believe it stands for "Domestic International Sales Corporation."

Q. Now you did learn that they concede that at least some of those questionable payments, including the illegal ones, affected their Federal Consolidated Income Tax Return, is that correct?

A. Yes, sir.

Q. Did you also learn that the Upjohn Company takes the position that some of those payments are not or will not affect their Federal Consolidated Income Tax Return?

A. Yes.

Q. Do you remember, offhand, what portion of the four-million odd dollars you have testified to that they concede were questionable payments, they concede have an impact on the Federal Consolidated Income Tax Return?

A. Approximately 3½ million dollars.

Q. On the Federal Income Tax Return?

A. I am sorry. The part that affects the Federal Income Tax Return is approximately $700,000.

Q. The part that they admit——

A. That they admit.

Q. Yes. And the part that they dispute is the remainder, is that correct?

A. Yes, sir.

Q. Did you learn after taking over this investigation that Mr. Gerard Thomas, an official of the Upjohn Company, had conducted an investigation of the amount and the nature and the extent of the illegal payments?

A. Yes, I did.

Q. Did you learn that among his methods of investigation was sending questionnaires to various individuals?

A. Yes.

Q. And requesting a response thereto?

A. Yes.

Q. Do you understand that the Summons we are seeking to enforce today, at least in part, demands that there should be a production to us of—and I am now quoting from the Summons: "written questionaires sent to managers up the Upjohn Company's foreign affiliates, and memorandums or notes of the interviews conducted in the United States and abroad with officers and employees of the Upjohn Company and its subsidiaries"?

A. Yes.

Q. You have not been furnished, have you, with the items that that portion of the Summons seeks to obtain?

A. No, I have not.

Q. Is it necessary to your investigation that you obtain those summons?

Mr. Roberts: Objection, your Honor. That is a conclusion the Court will have to draw. I think he can lay out the basis of why he needs the information, but not why it is necessary.

The Magistrate: Why don't you inquire along that line.

BY MR. FINK:

Q. Do you feel it necessary for your investigation——

Mr. Roberts: Objection again, your Honor. It's how you view these, and not how he does.

Mr. Fink: Well, let's find out first——

The Magistrate: I think the answer is going to be yes, obviously. Let's ask him why he feels that way.

Mr. Fink: All right. The next question, then——

Q. Why do you feel that you should have these documents, if I may add, rather than take the Upjohn Company's assurance as to what the relevance of those documents?

A. Well, I feel that those files may contain evidence that would indicate that there is in fact a tax implication involved in payments which the Company has alleged have no U.S. tax implication. These files may provide leads or other evidence that would have a relationship to those payments that the Company does admit have a U.S. tax implication.

I believe that it would—if it served no other purpose, it would help me corroborate the Company's position that there is no tax impact, if that is what the facts would show upon my investigation of the files.

Q. So while it may be a conclusion that the Court has to draw, in your view the summoned documents were, at the time summoned and are today, necessary to your continuing investigation, is that correct.

A. Yes, sir.

Q. Mr. Nowak, at this time there has been no recommendation for prosecution made to the Department of Justice, has there been?

A. No, sir.

Q. At this time have you yourself made a recommendation for prosecution to anyone?

A. No, sir.

Q. Have you reached in your own mind any fixed determination as to whether or not the Company or anyone else should be prosecuted?

A. No, sir.

Q. When you conclude your investigation, outline for us the possible recommendations that a Special Agent conducting an investigation might make?

A. I could recommend that the investigation be discontinued without prosecution of the Company or any employees, and there may or may not be a tax liability due and owing as result of the tax I uncover. I could recommend the institution of the civil fraud penalty upon a portion or all of the understatement that resulted from the facts that are being investigated, or a recommendation of

criminal prosecution could be made involving either the Company and/or some of its employees or officers, including—or, perhaps not including as well, the recommendation involving tax liabilties or civil fraud penalties.

Q. But so far no recommendation of any type has been made by you?

A. No.

Q. Nor by your predecessor, Mr. Rogowski?

A. No, sir.

Mr. Fink. I have nothing further of the witness at this time, your Honor.

The Magistrate: All right. Mr. McNelis.

Mr. Roberts: Mr. Roberts.

CROSS-EXAMINATION OF DAVID E. NOWAK
BY MR. ROBERTS:

Q. Mr. Nowak, at the time you came into the investigation——

The Magistrate: I mean, Mr. Roberts. Go ahead. I am sorry.

Q. Mr. Nowak, at the time you came into the investigation, the summons had already been issued, is that correct?

A. That's correct.

Q. And it was issued by Mr. Rogowski?

A. Correct.

Q. Do you know the status of the '72-73 civil investigation?

A. I believe I do.

Q. At that time?

A. Yes.

Q. And what was that status?

A. At the time that Summons was issued, it was still open administatively.

Q. But had not there been an 870-C presented to the Company by the Revenue Service?

A. I am not sure what you mean by an 870-C.

Q. This is a waiver of the restrictions on assessment that is provided for in the Code, which, by a taxpayer signing it, he waives his right to a 90-day letter, which entitles him to go to the Tax Court, and he agrees to accept the assessment immediately as opposed to the delay that is provided in the Code, if he doesn't sign the agreement to the assessment?

A. Well, I have never seen that document, but my understanding is it had been signed.

Q. It had been signed?

A. By the Company.

Q. And had been prepared by the Service, is that correct, for their signature?

A. Right.

Q. And the effect of this was to incorporate the agreed adjustments that the Company agreed to in its '72-73 Return and any other adjustments that the Service wanted to make, is that correct?

Mr. Fink: Well, I will object to that, your Honor. The document, if they wish to produce it, would speak for itself.

The Magistrate: Well, it is here. It is Exhibit 4 to Mr. Thomas' affidavit, apparently.

May I show it to the witness, counsel?

Mr. Roberts: Yes.

Q. Have you seen that—after you look at it, Mr. Nowak?

The Magistrate: Is Mr. Thomas here today?

Mr. McNelis: Yes, he is, your Honor.

The Magistrate: Okay. Thank you.

A. To answer that question, I have never seen this before right now.

Q. You have never seen the document before?

A. No.

Q. Now, as to the year 1974, at the time you came into the examination in December, the year 1974 was not and had not been under examination, is that not correct?

A. That's correct.

Q. And it was not open for examination until sometime the following year, early in the year?

A. I am not sure if I understand what you mean. My understanding is that it was open at the time we advised the Company that we were conducting an investigation, that the Intelligence Division had opened an investigation, and it included the year 1974.

Q. Intelligence Division, but I am talking about the civil audit that is now going on the '74-75 tax return was not open and the Company was not informed, was it, until January, 1977?

A. That's correct.

Q. Now you have said that the Company has resisted producing the documents called for in the Summons; is it not true that it is only two classes of documents called for in the Summons, and the third the Company contends did not relate to the Federal Tax Return that are not being produced?

Mr. Fink: Well, I would like counsel to lay—instead of talking about three classes of documents, to specify what class of documents he is talking about as provided for by the Summons. I am not sure. Perhaps the witness and counsel know what they are talking about, but I don't at this juncture.

Mr. Roberts: All right. I will redraft the question, your Honor.

The Magistrate: All right.

Q. As to—as the summons calls for all the files in the possession of Mr. Thomas—is that correct?

A. I assume you are stating it correctly, yes.

Q. You are not sure what the Summons calls for?

A. Well, I don't have it right in front of me.

The Magistrate: I will show the witness the Summons that I have attached to the Petition.

A. Yes. I says, "All files relative to the investigation conducted under the supervision of Gerard Thomas."

Q. And the Company has turned over to you as a result, has it not, the files that are associated with the branch operations of the Upjohn Company as they have been defined to you?

A. I know that the Company has turned over some documents relating to the branch operations, and those documents, I would assume are part of the files that he would have assembled in his investigation.

Q. And they are the documentation showing the amounts of the identified questionable payments, the back-up documents, the checks, et cetera, so that you can total them and see whether they do or do not compare with the amount that the Company has said were made in those countries, is that correct?

A. Yes, sir.

Q. And have you compared those amounts?

A. Compared them with what?

Q. The amounts that the Company says it made in those countries?

A. You mean compared the source documentation and the schedule?

Q. Yes.

A. That they supplied?

Q. Yes.

A. Yes.

Q. And they totaled together to your satisfaction, do they not?

A. The schedule they supplied me agrees with the source documentation.

Q. And the source documentation includes cancelled

checks, vouchers, advices, et cetera, is that correct?

A. Yes.

Q. And the items that to your knowledge are not being furnished to you are, one, Mr. Thomas' notes of interviews of officers of the Corporation, is that correct?

A. Yes, sir.

Q. And questionnaires that were sent to officers of the Corporation, is that correct?

A. Yes.

Q. And the back-up material similar to what you have, vouchers, checks, et cetera, of entities that it is the Company's position do not affect the U.S. Tax Return, with one exception that I will come to in a minute, is that correct?

A. That's correct.

Q. As to the——

The Magistrate: There is our fire drill. We do not use the elevators. There is a stairway right outside the courtroom, and it is six flights down. Take a short recess.

(A recess was had due to a fire drill.)

The Magistrate: We are in session. Mr. Roberts, you may proceed.

By Mr. Roberts:

Q. You know, Mr. Nowak, the years you said were covered by your investigation, I believe you said were '72, '73, and '74, is that correct?

A. Yes, sir.

Q. And covered by the summons, or is the summons really broader than the years covered by your investigation? I would ask you to look at the Summons.

A. The Summons indicates at the top that the years under investigation are 1972, 1973, and 1974, and the body of the Summons requests the investigative files covering the period January 1, 1971, and—it doesn't have an ending date in the body of the Summons.

Q. Now as you realize and know from your examination of the documents that had been furnished you, the 8-K that was furnished to the SEC, copies of it, the payments that the Company identified and that you stated amounted to slightly over $4,000,000 cover the years '71 through '75, isn't that correct?

A. Yes, sir; possibly a couple months in 1976, as well.

Q. And is it not true that for the taxable year '75, of which I believe you have seen the return, that the Company's Schedule M, which is an adjustment, the questionable payments, do eliminate those from deduction on the Federal Tax Return, is that not correct?

A. They did schedule——

Mr. Fink: Well, I am going to object only to this extent: The document would obviously speak for itself. I don't have it here. If counsel would tell how much was excluded from the '75 return, I would withdraw my otherwise I believe valid objection.

Mr. Roberts: What I am trying to show, your Honor, is that the Summons is broader than they conceivably could be inquiring about, and I don't believe the amount of the adjustment is pertinent. I think what is pertinent is the fact—and I think this witness can answer the question—that they did Schedule M the questionable payments that affected the U.S. tax return for 1975.

The Magistrate: I will take the answer.

A. The revenue agents have told me that some schedule or some questionable payments have been Scheduled M'd, adjusted out.

Q. And those would have been included in the $4,200,000 or .2 figure that you used, is that correct?

A. Yes.

Q. So that for the years that you are interested in, even the total figure is not really 4.2 million, is it?

A. Well, it is, because I was interested, and still am interested in, all those years.

Q. Well, relevant to the tax return for '72, '73, and '74, you may be interested. Maybe I used the wrong term. But the years you are examining and which you are entitled to relevant material, is it not, are '72, '73, and '74?

Mr. Fink: Well, I will object to the assumption that he is entitled only to those years. I am not sure—if counsel is trying to get across the fact that the four million dollar figure that the witness testified to on my direct has admitted questionable payments on the part of Upjohn, go over to the year '75 and possibly into two months of '76, he has that statement.

Mr. Roberts: And back into '71?

Mr. Fink: And back into '71.

So the picture would not be unclear. I was perfectly willing to drop the best evidence objections and others, if he would simply tell us the amounts involved.

The Magistrate: Is that your point, counsel?

Mr. Roberts: My point is that the figure that he has used is much broader than the '72-73-74 figure.

Mr. Fink: I am not going to accept your characterization that the figure is much broader. I am going to accept the characterization—I would be willing to stipulate to the characterization.

Mr. Roberts: I have a witness I will call.

Mr. Fink: All right.

The Magistrate: All right. Let's go ahead.

By Mr. Roberts:

Q. Now as a Special Agent, Mr. Nowak, your function is to investigate for criminal purposes, is it not?

A. That is one of my functions, sir.

Q. And what is the function that is identified in the manual as your function?

A. I don't know, because I don't know exactly what the manual says. I haven't looked at it.

Q. You are not sure that the manual encompasses everything that you say you do in the examinations, is that correct?

A. What I am saying is that I don't know what the manual specifically—how the manual specifically describes the functions of a Special Agent. I know that. . . .

Q. Once you conclude there is no fraud, you get out of the case, is that not correct?

A. Not always. Sometimes a special agent will stay in. If you are talking about any fraud, I think that would be a correct statement. We will stay in a case to assist in establishing the civil fraud penalty, even after we have determined that there are no criminal violations in the case.

Q. Do you know, Mr. Nowak, whether prior to the issuance of a Summons, the Summons and the papers recommending it were forwarded to Washington?

A. I don't know if they were or not.

The Magistrate: What do you mean "Washington"? That is a big city. Do you mean Justice?

Mr. Roberts: The Commissioner. Sent to Washington for approval, your Honor.

Mr. Fink: For the issuance of the Summons?

Mr. Roberts: Yes.

A. I have no knowledge as to whether or not that happened.

Mr. Roberts: I have no further questions, your Honor.

The Magistrate: Thank you, Mr. Roberts.

Anything else of this witness?

Mr. Fink: May I see that Summons?

The Witness: Yes, sir.

REDIRECT EXAMINATION OF DAVID E. NOWAK
BY MR. FINK:

Q. Are you acquainted, Mr. Nowak, with the circumstances of the reason the 870-C, which has been referred to, was not signed on behalf of the Commissioner of Internal Revenue?

A. Yes, sir.

Q. 870-C is, I gather, if not an Exhibit, is attached to Mr. Thomas' affidavit, I believe. Yes, it is attached to Mr. Thomas' affidavit, which is on file with the Court, and bears the date when signed on behalf of the Company.

The Magistrate: It is the last page.

Mr. Fink: Yes. Thank you, your Honor.

Q. Of March 4, 1976. Are you familiar with when Upjohn Company made its disclosure to the securities and Exchange Commission as to these questionable payments, both by domestic and by foreign companies?

A. I know approximately when they made the disclosures.

Q. Do you know approximately when they did—go ahead.

A. It was approximately the end of March, 1976.

Q. So before this document could be signed on behalf of the Commissioner of Internal Revenue, the Company disclosed that its return was not accurate, did it not?

A. They disclosed that it may not be accurate.

Q. Was it as a result of that, that the 870-C was not signed on behalf of the Commission?

Mr. Roberts: If this witness knows, otherwise I would——

The Magistrate: Yes.

Do you know, Witness?

The Witness: I have obtained an understanding as to why it wasn't. To say that I don't know, I would have to ask the person that refused to sign it, I suppose.

The Magistrate: Refused to sign it for whom?

The Witness: For the audit case manager and the revenue agent that was involved in the audit and wrote the referral report.

BY MR. FINK:

Q. When you say "referral report," you mean referral from the revenue agents to the Intelligence Division, is that correct?

A. Yes, that's correct.

The Magistrate: I will take the answer.

A. I have lost track of the question now.

The Magistrate: What was your understanding that you obtained as to why the Commissioner did not sign the 870-C, whatever it is?

The Witness: My understanding was that while it was being considered in the administrative review process, the disclosure by the Upjohn Company was made. It was apparent that there may be some U.S. tax implications, that the return may not be correct, and that the—therefore the civil audit was retained or re-obtained, obtained from the administrative process to determine whether there was any other civil or criminal implications relating to those years.

Q. Now actually, Mr. Roberts has asked you about material furnished to you in connection with your investigation. He indicated that you had been furnished with what I believe he called an 8-K or that you had in your possession an 8-K; do you remember that?

A. I do have that document in my possession now.

Q. Yes. The 8-K is what, a document filed with whom?

A. It was a document that was filed with the Securities and Exchange Commission.

Q. And a copy of it was forwarded over to the Internal Revenue Service, is that correct?

A. Yes.

Q. You have also been furnished with certain schedules, is that correct?

A. Yes.

Q. What do those schedules show as to the so-called questionable payments?

A. You mean how are they set up, the format?

Q. How are they set up?

Mr. Roberts: We submit, your Honor, that the schedules would speak for themselves.

The Magistrate: Are they present? Should they be part of the evidence in this case, or not?

Mr. Fink: If counsel wishes them.

The Magistrate: Well, then why don't we identify them and introduce them.

Mr. Roberts: May I inquire?

(Mr. Roberts conferred with Mr. Fink off the record and out of the Reporter's hearing.)

Mr. Fink: Counsel does not desire these disclosed at this time. Perhaps we could get somewhere over——

The Magistrate: Well, I can't decide this in a vacuum. You keep talking about these things that I have never seen before. I would be helpful if at least I could see them.

Why don't you go ahead and we will see what we can do.

Mr. Fink: All right.

Q. I will hand you something that we will not at this time mark for identification, so that it might refresh. And if I may approach——

The Magistrate: Any objection, counsel, to my looking at this?

Mr. Roberts: No objection, your Honor.

(A document was handed to the Magistrate.)

The Magistrate: All right. Do you want the witness to have this?

Mr. Fink: Yes.

Q. And the witness has before him the document, which we have not marked but which, with permission of counsel also, the Court has been permitted to look at.

These are the schedules referred to?

A. These are, yes, the schedules you have been referring to.

Q. Since the record will not be complete without some description of the schedules, the schedules consist of years, amounts, and companies or countries, is that correct? Give us a brief description of what is before you.

Q. Well, it is an accounting spread sheet type of analysis showing the years in which various payments were made, possible questionable payments, the company that made the payment, and the branch or the geographical location of the operation within the Company that was making the payment. And then it is cross-footed and totaled at the bottom.

The Magistrate: And what are the years covered?

The Witness: The schedule covers the years 1971 through 1976.

The Magistrate: All right.

By Mr. Fink:

Q. Now the first page of that schedule is—has a summary of Company payments by year "(Companies listed are those Companies with U.S. tax implications only)";

is that true of all the attachments, too? You have only been given the . . . .

A. The attachments to this particular schedule are a breakout in greater detail what is summarized on the title which you just read.

Q. Is that correct, then, this schedule deals only with Company—with contributions, payments, illegal bribes made by the Upjohn Company, which they are prepared to concede affect their domestic tax return, is that correct?

A. Well, I don't know if they are prepared to concede that. It may——

Q. No, they have conceded it.

Mr. Roberts: We concede they affect the tax return. We do not concede that they are illegal or not deductible, your Honor.

Mr. Fink: But this schedule, voluminous as it may be, does not include the payments, which are $4,000,000 minus approximately $700,000 for the total period we are talking about?

Mr. Roberts: That is correct.

By Mr. Fink:

Q. Well, then, so far you have been given the schedule of the admitted deductible or non-deductible payments, is that correct?

A. I have been given that schedule.

Q. Yes. So far, have you been given any schedule similar to this, covering the amounts of so-called, what Upjohn calls "non-tax impact questionable payments"?

A. Yes, I have.

Q. You have been. Similar in character to this, or even more schedules?

A. It is similar in character to this but not quite as detailed.

Q. I have it——

A. I believe.

Q. ——showing amounts, is that correct?

A. It shows amounts, and—I would have to see it again before I would say for sure what it shows.

Q. And you have been given at least some cancelled checks, invoices, et cetera, underlying this schedule?

A. Yes, I have

Q. All right. And you did say on cross-examination that you had compared the amounts here with the back-up documents, is that correct?

A. Yes, sir.

Q. Is there any way you can tell from those back-up documents who the ultimate recipient of any bribes, kickbacks, or illegal payments was?

A. No, sir.

I would like to clarify that: I think it is possible that some of the documentation may indicate who the ultimate recipient was, but I have no way of knowing that that person was the ultimate recipient at this time.

Q. Some of the documents may indicate but you have no way of checking, is that right?

A. That's right.

Q. Do you have any way of checking whether there are —were more payments than this made, in perhaps fashions which would not be recorded on the financial records of the Company?

A. I have no documentary evidence available that would allow me to assure myself that this is a complete statement.

Q. Nor has any such been furnished to you?

A. That's correct.

Q. In fact, the schedule and the so-called back-up documentation given to you, consisting mostly of cancelled checks and so forth——

A. Yes, sir.

Q. ——asked you to take at face value Upjohn's only internal investigation, is that correct?

A. It asked me to take at face value the summary of Upjohn's investigation.

Q. All right. You were hopeful to obtain more by our Summons, is that correct?

A. Yes, sir.

Q. I did notice you testified to Mr. Roberts' question that investigation for criminal purposes was one of your functions.

A. Yes.

Q. Does every investigation you conduct prove a criminal—come out that there was in fact a violation of the criminal tax laws?

A. No, sir.

Q. So when you say you are conducting a criminal investigation, what do you mean?

A. I am conducting an investigation to determine if there has possibly been a violation of the Internal Revenue laws or related laws.

Q. I won't go into detail, but have you conducted a number of investigations in your career, ten-year career as a Special Agent?

A. Yes, sir.

Q. What percentage of them, would you say, that resulted in a criminal prosecution?

A. I would say 20 to 25 percent.

Q. Is determination of civil liability an important element in a criminal investigation?

A. Yes, sir.

Q. Explain why.

A. Well, one of the laws that I would normally be investigating would be income tax evasion, which would require the proof of a tax liability along with other things for there to be an evasion, and in some instances, even though the tax liability may not be an item of proof in a criminal case, it goes to the materiality of a potential vio-

lation or prosecution and whether or not the Government or the Internal Revenue Service would consider a possible violation with really criminal material worthy of prosecution.

Q. When the matter—when you entered the investigation—I think we have already more or less established that your '72 and '73 had not been closed because of the disclosure made by Upjohn itself to the SEC—and, incidentally, to the Revenue Service—that then the matter was referred to Intelligence, and the investigation was expanded to cover the year '74, is that correct?

A. Yes, sir.

Q. I believe you testified in response to——

Mr. Roberts: May I have that question and answer again, please.

The Magistrate: Would the Reporter read it back.

(Last question read.)

Q. You understood the question?

A. Yes, I did.

Q. But I think you also agreed with Mr. Roberts, or perhaps agreed with him, that the civil audit of the 1974 return did not commence until January of '74; did I understand you to agree to that?

A. I believe he said that the date January was an approximate. It may have been a couple of months later.

Q. But what did you mean the civil audit of the '74 return at that juncture, what were you talking about?

A. Well, there is a—most large corporations are audited for every tax year, and the strictly civil audit is—Mr. Roberts used the term "covers all issues that the service might be interested in that are on the return being audited. That audit commenced with agents at the Company premises sometime in the end of March, 1976. And before that audit commenced, we held a meeting in Detroit with several representatives of the Upjohn Company and repre-

sentatives of the Service to lay down the groundrules and reach understandings as to the audit that was about to commence and the relationship of the criminal investigation that was still open, to make sure that all parties clearly understood the situation. I don't recall the date of that meeting.

Q. But when you took over the matter in December of 1976, and the tax year 1974 was part of the then investigation going on, that investigation was going on with respect to what aspect of the '74 return?

A. The questionable payments.

Q. Did you have the assistance of a revenue agent in that aspect of the audit of the 1974——

A. Yes, sir.

Q. ——return? So from the very beginning, the 1974 return was under investigation by a revenue agent and a Special Agent, but only with respect to the item of questionable payments, is that correct?

A. Yes.

Mr. Fink: I have nothing further.

RECROSS-EXAMINATION OF DAVID E. NOWAK
BY MR. ROBERTS:

Q. Mr. Nowak, you say the only documentation furnished has been that which the Company has furnished you, re the sensitive payments, is that correct?

A. Yes.

Q. You have filed, I believe in connection with your investigation, some 36 IDR's, which, for purposes of the record, are "Information Document Requests" that are normally served by an agent in the course of his investigation asking for documents, et cetera; is that right?

A. Yes, sir.

Q. And you have been furnished documents that you have requested by IDR's, have you not?

A. Yes.

Q. And with the exception of some recent IDR's that are still being worked on to get the back-up material, has the Company refused to respond to any IDR's?

A. No, except with those exceptions that you have just stated exist.

Q. Well, we have not complied because we are still getting the information together. I mean, you understand——

A. No, I am sorry. I understand that some of them may not be complied with.

Q. May not be complied with?

A. Yes.

Q. There are two, I believe—or, one, that asks for the same type of back-up material for Mexico and Brazil, is that not correct?

A. Yes, sir.

Q. Now, the Company has made available to you for interview, has it not, people who you have asked to interview?

A. Yes, sir.

Q. Has it refused to produce anyone for interview who you have asked to interview?

A. No, sir.

Q. And it has said that it would make available to you for interview any of the officers or employees that you asked for, is that correct?

A. Yes, sir.

Q. And it is true, is it not, that you do plan to go to some of the foreign areas to interview the people who are there, is that correct?

A. That is a possibility, yes.

Q. And you have interviewed approximately how many —strike that. The people who Mr. Thomas interviewed have been identified to you, have they not, either Mr. Thomas or outside counsel working with Mr. Thomas in interrogating and inquiring into this problem? The list of people has been furnished to you, has it not?

A. I have received a list, yes.

Q. And of those he has talked to, you have talked to already, if not exactly, 25, is that not correct?

A. I would be willing to accept your count.

Q. And the others that he interviewed or that were interviewed in conjunction with his injuiry are on your list also, are they not?

A. Yes.

Q. So that everyone who he has interviewed or were interviewed in conjunction with his inquiry that admittedly affected the U. S. Tax Return are in the process of being made available to you at your demand, it that not right?

A. Yes, sir.

Q. Now, did the Company not agree that rather than comply with the summons as to the countries that it contends does not affect the U.S. Tax Return, that they invited the Service to inquire and maybe visit those, take one, two, or more of those countries to satisfy itself that the payments did not affect the U.S. Tax Return?

A. That's not clear. Mr. McNelis and I—may I explain?

The Magistrate: Yes, please do.

A. Mr. McNelis and I had a meeting last week, and he indicated himself he was unclear as to whether such a commitment had been made, because we were discussing IDR's that hadn't been filled. And I don't know what the Company's position is at this time.

Q. We will let you go anywhere, will we not, and inquire, and this is what we have said we would do. The question is—whether I believe that you have with Mr. McNelis—is whether we will bring back here the back-up materials, is it not; it is not whether we will let you go to Brazil and Mexico and talk to our people?

Mr. Fink: The question is whether the Governments of Brazil, Mexico, Switzerland, Philippines, et cetera, would permit it, even assuming the budget of the Revenue Service could bear such a——

The Magistrate: Let me clarify something at this point, and I think it is pertinent: Do I understand that you refused to release the questionnaires with the answers that Mr. Thomas sent out to the Service? Do you not want to release those questionnaires?

Mr. Roberts: We are producing the questionnaires.

The Magistrate: Do I understand, though, that if they went to a particular employee who filled out the questionnaire, and asked for his copy of it, you would not object to that?

Mr. Roberts: I am not sure he has a copy and I assume that's if they interrogated him and wanted the copy, that he might have to produce it, your Honor. We have not been faced with this situation——

The Magistrate: Do you know whether these people do have copies of the questionnaries that they completed and submitted to defense counsel?

Mr. Gerard Thomas: I do not.

The Magistrate: Okay.

By Mr. Roberts:

Q. The people who you have interrogated, the 25 already, did you ask any of them for copies of the questionnaires or their answers thereto?

A. Indirectly, for sure.

Q. In the questions that you asked them, did you ask them, either Dr. Partisetti, who is the Chief Executive Officer of Italy who was in this country and was made available to you for examination, did you ask him for copies of the questionnaire?

Mr. Fink: Well, I am going to object to that, because——

The Magistrate: Well, I would like to hear the answer to that. I think I want to see where we are going here.

State your objection for the record. I am sorry.

Mr. Fink: Well, my objection for the record, your Honor, is there was a transcript made of that particular interview recorded just as it is here. It was a question and answer under oath. Mr. Roberts was present.

The Magistrate: Well, all right.

Mr. Fink: And the transcript itself will speak best for what Mr. Nowak was permitted to ask.

The Magistrate: If Mr. Nowak knows the answer to the question, I would like to have it.

A. I did not specifically ask him for the questionnaire.

Q. And, Mr. Bob Casler, the Manager in Hong Kong, was here and made available to you for questioning, was he not?

A. Yes, he was.

Q. And did you ask him for a copy or whether he had a copy of the questionnaire?

A. No, I didn't.

Mr. Roberts: I have no further questions.

The Magistrate: Mr. Roberts, if he had a copy, would the Company object to releasing it through the particular officer?

Mr. Roberts: If the individual had no objection, I don't believe we would.

The Magistrate: Why would he have an objection?

Mr. Roberts: Well, I assume that he probably would not. I don't know whether he would or not. I am not confident at all—and I don't know—the Company cannot make the individuals testify. I am not even sure that some of them will testify.

The Magistrate: Okay.

Mr. Roberts: They are being made available for whatever questions, and we are not going to advise them—I will say this: We will not advise them not to cooperate, but I think this is a question that they have to answer in view of their own laws as to whether or not they want to answer certain type questions.

The Magistrate: They could possibly incriminate themselves under the local laws in that country?

Mr. Roberts: Yes.

The Magistrate: I see. Counsel, do you have some more questions?

REDIRECT EXAMINATION OF DAVID E. NOWAK
BY MR. FINK:

Q. Mr. Nowak, at any point in this deposition or interview of the Italian gentleman, Mr. ——

A. Partisetti?

Q. ——Partisetti.

Q. Partisetti. Did Mr. Roberts stop you from any lines of inquiry?

A. Yes, sir, he did.

Q. Do you recall what lines of inquiry he asked you not to go into?

A. Into the specific area of the questionable payments made by the controlled foreign corporations that Mr. Partisetti was responsible for.

Q. So if Dr. Partisetti or Mr. Partisetti had been more candid in his office or in his questionnaire response to Mr. Thomas, that is information you were not permitted to get at his deposition, isn't that correct?

A. Yes, sir.

Q. Would the same thing be true of your deposition or your inquiries into—with Mr. Casler, the other gentleman named?

A. Yes, sir.

When you say would the same thing be true, you mean do I believe I would have been stopped?

Q. First of all, did you endeavor to go into that line of inquiry?

A. No, I didn't.

Q. Why did you not go into that line of inquiry?

A. After the interview with Mr. Partisetti, Mr. Roberts, Mr. McNelis, and myself had a meeting, and they indicated that their position was at this time that they were not going to allow me to interview these witnesses, specifically, for details of the transactions involved in those situations where they say there is no U. S. tax impact, until this summons' situation was solved. So there was no point in me interviewing any other witnesses in this regard, because I knew he would object. He indicated he would.

Q. You understood the ground rules under which you were then being permitted to operate, is that correct?

A. Yes.

Q. All right. Mr. Roberts asked you on his recross if the Company had offered to make available to you all the individuals listed on that interview sheet who were—with respect to the questionable payments, which they admitted affected their income tax return, is that correct, is that what he asked you and what you answered? That is what I understood.

A. I am not sure that I understand what you are just asking.

Q. All right. I understood him to have asked you, and you responded yes, whether they had not agreed to make available to you all the individuals on the questionnaire, to the extent that those individuals might have information with respect to those payments which the Company admitted affected their domestic tax—Federal income tax returns, is that correct?

A. Could you read that back?

Q. All right. Did they offer to make everyone available to you, is what I am asking? I did not get the import of your question—or, I understood him to limit it.

A. Yes. My understanding was they would make everyone available to me, but they won't allow me to ask every question I want.

Q. Okay. I guess we have that straight.

Mr. Fink: May I have just a moment, your Honor?

I have nothing further.

Mr. Roberts: The only thing—I would like to clarify one point.

RECROSS-EXAMINATION OF DAVID E. NOWAK
BY MR. ROBERTS:

Q. Mr. Nowak, you do concede, I believe, or state—maybe a better way of putting it rather than "concede"—that you are not limited to inquiring into any entity that affects the U.S. Tax Return?

Mr. Fink: Well——

Q. Or that the Company says affects the U.S. Tax Return?

Mr. Fink: All right. "That the Company says affects."

A. I have not as of this date encountered any limitations being placed on that.

Q. And have we not stated that if you can show us or if the Service can show us, and told this to the International man, I think in your presence, that if the Service would show us how these payments, made by a non part of the consolidated return, would affect the tax return, we would make them available?

A. I don't believe you have ever told me that, and I believe that the position you took when you interviewed Mr. Partisetti was that you had already made that determination and wouldn't listen to my arguments.

Q. Now, Mr. Nowak, you have reviewed each of the IDR's issued by the other agents in this case, have you not?

A. No.

Q. Your name is on them. You have not reviewed them, though?

A. No, I don't review all the IDR's that are submitted.

Q. You are not aware, or are you aware, of an IDR that was issued by the International Specialist asking for the Company's statement as to why or, one, what it based its position that these payments by entities not within the consolidated return or not within a U.S. Tax Return affected, would not affect the tax return?

A. I know he made such a request, yes.

Q. And you know the Company answered that, do you not?

A. Yes, sir.

Q. And do you know whether or not he accepted that?

A. I think he still has an IDR that hasn't been filled that he is waiting for a response on before he makes a final determination.

Q. But he has not indicated to the Company otherwise, is that right? You say he has another IDR?

A. I think he, in effect, has, because he still has an IDR that hasn't been filled.

Mr. Roberts: I have no further questions.

Mr. Fink: Nothing further.

The Magistrate: Okay. You may step down. Thank you.

How about a short recess at this point?

Mr. Roberts: Sure.

The Magistrate: About ten minutes.

(A recess was taken at 3:05 p.m.)

Mr. Fink: Your Honor, I trust that I may recall Mr. Nowak to the stand for what will be no more than two or three omitted questions.

The Magistrate: We will see if it is two or three, or not.

All right. Mr. Nowak.

(David E. Nowak resumed the stand and testified further as follows:)

FURTHER REDIRECT EXAMINATION OF DAVID E. NOWAK
BY MR. FINK:

Q. Mr. Nowak, you have been sworn, of course.

Some comment has been made about the years '71 and '75 with respect to this Summons. Would you briefly explain the relevance and necessity for those documents and the other information sought with respect to your investigation, which is currently for '72 through '74?

A. Well, in relation to 1975, the fact that there has been a Schedule M adjustment indicates that there is an item that the Internal Revenue Service ought to check to make sure the adjustment has been treated properly. And, in addition, the Government's position, the Internal Revenue Service's position has always been clearly stated that while the investigation covered the years 1972 through 1974 we were not precluded in opening up going into the 1975 were we to find indications of possible criminal or civil ramifications in these payments.

And in regard—we could also have the option of going back to 1971, if we wanted to.

Another possible relevancy for that material, especially 1971, is the possibility of transactions occurring in one year and not being recorded on the books and records of the Company in that year, but for various reasons, through error or otherwise being recorded in another year, so we would have to make sure that transactions were properly reflected in the year that they occurred.

Q. Insofar as you know, the Summons was drawn by someone else, is that correct?

A. Yes, sir.

Q. Not by you. And it was drawn, was it not, with the knowledge that Upjohn Company had made revelations to the SEC which covered the period '71 through '75?

Mr. Roberts: If your Honor please, as the agent who issued the Summons is in the Courtroom, I believe he is the better person to answer these questions.

Mr. Fink: It is Mr. Rogowski.

The Magistrate: He is here?

Mr. Fink: He is here.

The Magistrate: Why don't we pursue it with him, then, counsel.

Mr. Fink: Well, I hadn't proposed to put him on, but, if necessary.

The Magistrate: All right.

Mr. Fink: All right. I have nothing further.

Mr. Roberts: I have no further questions.

The Magistrate: Okay.

Mr. Fink: Nothing further. You may step down.

I will put Mr. Rogowski on for that limited purpose, your Honor.

James M. Rogowski,

called as a witness by the Petitioners, being first duly sworn, testified as follows:

DIRECT EXAMINATION
BY MR. FINK:

Q. State your full name, please?

A. James Rogowski.

Q. What is your employment, Mr. Rogowski?

A. I am a Special Agent with the Intelligence Division of the Internal Revenue Service.

Q. Where are you stationed?

A. Detroit, Michigan.

Q. What is your education?

A. I have a Bachelor's Degree from the University of Michigan.

Q. How long have you served as a special agent?

A. Probably eight years.

Q. You were the special agent who issued the Summons which we are dealing with in this proceeding?

A. I am.

Q. The language of the Summons is yours; you drafted it?

A. I drafted the Summons.

Q. Alone or in consultation with someone else?

A. The——

Q. I will hand you a copy of the Summons, with permission of the Court.

The Magistrate: Yes.

A. I drafted the Summons subject to the approval of my group manager.

Q. At the time you drafted this Summons, were you aware of an investigation that had been conducted by the Upjohn Company, the results of which—or, at least the summary results of which had been turned over to them by the Securities and Exchange Commission?

A. Yes, I was.

Q. Were you aware at the time you drafted that Summons of the years covered by their report of that investigation?

A. Yes, I was.

Q. What are those years?

A. January 1, 1971, through the first two or three months of 1976.

Q. Had you been advised by Upjohn Company that they would not furnish you with various questionnaires and other items which had, presumably, gone into that report, without your taking legal action?

A. I was.

Q. Did you draft that Summons in the light of that knowledge?

A. Yes, I did.

Q. Where did you get the language that you used, as best you now recollect?

A. The language I used came from either the 8-K or an amended 8-K, or possibly some other correspondence that Upjohn submitted to the Securities and Exchange Commission. And this is the language that Upjohn Company used in describing Mr. Thomas' investigation.

Q. And your Summons was designed to get Mr. Thomas' investigation, is that correct?

A. Yes, it was.

Q. In its entirety?

A. Yes, sir.

Mr. Fink: I have nothing further.

CROSS-EXAMINATION OF JAMES M. ROGOWSKI
BY MR. ROBERTS:

Q. Mr. Rogowski, you said, I believe, that the Summons was approved by your group supervisor, is that correct?

A. Yes, sir.

Q. Was it approved by anyone above your group supervisor?

A. I consulted with our regional counsel before I issued the Summons.

Q. Do you know whether or not approval was obtained from the Chief Counsel or Chief of Audit in Washington, D.C., of the Service?

A. Our Regional Counsel may have consulted with somebody in Washington. I don't have any direct knowledge of this.

Q. Do you know whether he did or not?

A. It is possible.

Q. Possible, but you do not know one way or the other, is that correct?

Mr. Fink: The witness has so testified.

Mr. Roberts: That is right.

I have no further questions.

The Magistrate: You may step down. Thank you.

Mr. Fink: Your Honor, in our view we have established a prima facie case for enforcement of the Summons, having met the requirements of, I guess it is Donaldson, one, the procedural regularity of the Summons was admitted before we came to Court; two, the information we seek is necessary to the investigation, relevant to the investigation; and the information that we seek, the data we seek is not—and the various documentation we seek by the Summons is not in the possession of the Special Agent at this time.

My understanding is that Respondents now propose to take on what we would call their heavy burden of establishing affirmative deefnses to the Summons.

So on the assumption that we have made a prima facie case, your Honor, I rest.

(The Petitioners rested.)

The Magistrate: All right. Mr. Roberts, whatever your burden is, do you want to assume it?

Mr. Roberts: I beg your pardon?

The Magistrate: Whatever your burden is, do you want to assume it, and we will proceed.

Mr. Roberts: Yes.

Mr. Thomas.

Gerard Thomas,

a Respondent herein, called as a witness on his own behalf, being first duly sworn, testified as follows:

DIRECT EXAMINATION
BY MR. ROBERTS:

Q. Will you state your name and address for the record, please, Mr. Thomas?

A. I am Gerard Thomas, G-e-r-a-r-d, Thomas. I reside at 1558 Spruce Drive in Kalamazoo, Michigan.

Q. And are you an attorney, sir?

A. Yes.

Q. And what Bars are you a member of?

A. I am admitted in New York State and Michigan.

Q. And how long have you been general counsel of the Upjohn Company?

A. 1961.

Q. And when did you first become employed as an attorney for the Upjohn Company?

A. In October 1956.

Q. And as General Counsel of the Company, are you called upon to give legal advice to subsidiaries of the Company as well as just to the parent company?

A. Yes.

Q. Mr. Thomas, when did you first become aware that the Upjohn Company might be involved in what has been referred to as "questionable payments"?

A. In January 1976.

Q. And prior to this time did you have any knowledge or belief that the Company might be involved in making what has been referred to as "questionable payments"?

A. No.

Q. Now, will you identify or define for the Court and for the record what you intended and what you included in the term "questionable payments"?

Mr. Fink: So that we will be clear, "included" at what time in his answer to your quetsion just now, or on some other occasion?

Mr. Roberts: In his filing with the SEC.

Mr. Fink: All right.

Mr. Roberts: And what has been described as questionable payments by him consistently, by him since he first became aware that there might be questionable payments. I am trying to get the definition, the framework——

A. Right.

The Magistrate: All right. You may answer.

A. Yes. "Questionable payments" are payments made by or on behalf of the Company or its subsidiaries, which were made to third parties or to Government employees under circumstances indicating that they might be for improper purposes.

Q. And under circumstances, what do you mean by that, Mr. Thomas?

A. Let me comment on this a little bit, because it is a difficult question as you get into it.

In many foreign countries, payments are made to various agents, commission men, influence people, to obtain business, to obtain Government permission, sometimes permis-

sions which you are completely entitled to, no question about. These people represent that they can get you this business or this kind of treatment, and as you investigate and dig into them, there are circumstances around some of these payments which create the suspicion that all or part of this money went on to Government people. In fact, most of these payments, the vast majority of them were made not to Government employees, but to third parties, to citizens. And it is a difficult subject.

Q. Now as a result of being informed that the Company was possibly involved in the making of questionable payments, what did you, as General Counsel of the Company, do?

A. Well, as soon as we got information in one country that suggested this possibility, it became obvious that we had to—or, I had to determine what the true facts were. They're difficult to get hold of, and without these facts, it was impossible for me to give legal advice to the Company, to counsel as its attorney. So I had to get the information upon which I could base my legal opinion and legal advice and get it as accurately, completely, and promptly as I could.

Mr. Fink: Your Honor, since Mr. Thomas wears several hats, I am certainly not going to interrupt the flow of the conversation, but obviously it may become important at some time for your Honor to decide whether Mr. Thomas was acting in his capacity as General Counsel for the purpose of giving legal advice, or in some other capacity. The fact that I don't object at various times during the direct examination or the responses to their own characterization of his position, I trust will not be held against us.

The Magistrate: It won't. Why don't you just make your point on your cross, of course.

Mr. Fink: Sure. I just didn't want to make the assumption that it was permitted without our objection on direct to bother things.

The Magistrate: All right.

BY MR. ROBERTS:

Q. Mr. Thomas, before we go on, will you, for the record, state your full title in the Company?

A. I am Vice President, Secretary, and General Counsel, and also a member of the Board of Directors of the Upjohn Company, which is the parent company. Obviously Upjohn is an affiliation of literally dozens of U.S. and foreign companies.

Q. Now, in this inquiry that you were conducting, what was the purpose of the inquiry?

A. As I stated before, to gather accurately the information on which I, as general counsel, could give my opinion and my advice and guidance to the Company.

Q. And did you consult with outside counsel prior to undertaking any inquiry?

A. Yes, I did.

Q. And what course of action did outside counsel recommend to you, Mr. Thomas?

A. They really recommended two things: First, that it was necessary to gather this information to get as complete factual basis as we could. And we also discussed whether this investigation or this gathering of information was better conducted by me or by the outside counsel, and they recommended that it be—the information be gathered by me with their assistance.

Q. And what recommendations did you make to the Chairman of the Board of the Upjohn Company?

A. Essentially the same recommendation.

Q. And did he approve this recommendation or did the Board approve it?

A. Both did.

Q. Did outside counsel assist you in the inquiry that you conducted?

A. Yes.

Q. Did they assist you in formulating your recommended course of legal action?

A. Yes, they did.

Q. And did you recommend courses of legal action to the Company?

A. Yes.

Q. What type of legal entities does the Company have overseas?

A. Well, let's start with the Upjohn Company, which is the parent company. That in turn owns U.S. subsidiaries and foreign subsidiaries, and there are subsidiaries of subsidiaries. So there are these first and second level of subsidiaries overseas, and also some of the subsidiaries have branches overseas. Most of these organizations are completely owned by the Upjohn Company one hundred percent, although in some instances there are affiliated companies of which we are not one hundred percent owners.

Q. Directing your attention to the first notes you made of conversations with the officers that you contacted, what was the position in the organization outside the United States of the officer or officers who you contacted?

A. Well, in our foreign operations, the Chief Officer or the head man has different titles: Managing Director somewhere, General Manager somewhere, but in each instance I went to our chief—the chief official in that subsidiary or that legal entity.

Q. And it is these notes of these conversations with the Chief Executive Officer of the subsidiary that we are talking about that have not been turned over to the Service, is that correct?

A. Yes.

Q. And in these interviews, were they conducted by telephone, or personally, or both?

A. Both.

Q. And which country or which areas did you personally visit as opposed to contact by telephone?

A. The foreign countries in which I conducted interviews were Brazil, South Africa, Kenya, Japan, Korea, Hong Kong, Indonesia, and Australia.

Q. And where outside counsel did the interviewing, do you know whether it was done by visits or by telephone?

A. I think it was done on a face-to-face basis. There may have been phone conversations, but I cannot recall.

Q. Are the written notes that you made or that the outside counsel made, to your knowledge, verbatim transcripts of the conversation that you had?

A. They are not. In no case did we have a recorder or a reporter recording device, and obviously it would be impossible for me or for outside counsel to have made verbatim notes of those interviews.

Q. And what do your notes contain, basically, without going into the details of any particular one, but in general, what do they contain?

A. My notes would contain what I considered to be the important questions, the substance of the responses to them, my beliefs as to the importance of these, my beliefs as to how they related to the inquiry, my thoughts as to how they related to other questions. In some instances they might even suggest other questions that I would have to ask or things that I needed to find elsewhere. They were more than just a verbatim report of my conversation with the—a report of my conversation in the interviews.

Q. Have your notes of your interviews or the answers to the questionnaires been furnished to other persons, other than counsel, either yourself or people within your organization, as counsel or outside counsel?

A. They have been provided to outside counsel. They have been provided to no one else within the Upjohn Company or any of its affiliated people. In fact, the only people, except myself, that have seen them are some outside counsel.

Q. Now who prepared the questionnaire that was sent out, Mr. Thomas?

A. It was prepared by me and by attorneys with the law firm of Covington and Burling. We worked together.

Q. Was a questionnaire sent to all persons whom you interviewed, either by person or by telephone?

A. I believe that I interviewed all the people who received questionnaires. I interviewed some other people, in addition.

Q. After the interviewing and the results and the answers to the questionnaires came back, did you consult with outside counsel as to the proper legal steps for the Company to take?

A. Yes.

Q. And did you arrive at legal steps that the Company should take?

A. Yes.

Q. And are you aware of whether or not the Company has agreed to make these chief operating officers or chief executive officers available for questioning to the IRS as it pertains to entities that do affect the U.S. Tax Return?

A. Yes, we have and will.

Q. Now, the Petitioner has used the phrase "slush funds," questionable payments in connection with slush funds and off Company—I think it is "off record"——

A. "Off book," is it?

Q. I have got it right here. It refers to off the books in quotes, "slush funds." In your investigation, inquiry or questionnaire, did you find any off the book accounts reviewed?

A. No.

Q. Would you explain what your understanding is in your conversation with people what is a slush fund?

A. Let me——

Mr. Fink: Well, I am going to object. I am not sure what his conversations with other people, unidentified, are. Are we getting at the skill with which he conducted his investigation?

Mr. Roberts: I am getting at what his knowledge. The enforcement in—the brief in support of the enforcement

says that "Upjohn's investigation revealed that its foreign and domestic subsidiaries had made over $4,000,000 in illegal bribes, kickbacks and other payments to foreign Government employees and foreign nationals in thirty countries through 'off the books' slush funds." I don't think that is a correct statement by any means of what the Upjohn Company's investigation disclosed.

The Magistrate: Whose brief are you reading from; the Government's brief?

Mr. Roberts: I am reading from the Petitioners' Brief in Support of their Petition to enforce an Internal Revenue Service Summons.

The Magistrate: Let's see what he considers "slush funds."

He may answer.

A. Yes, I think that is a good question.

I consider a slush fund to be a fund of money, usually in cash, usually off the books, that a company generates for improper or illegal purposes. And I think it attained much notariety and probably is best known as the device by which corporations generated funds by which they could make illegal political contributions in the U.S. And I think slush funds to most of us has that kind of connotation. In fact, Upjohn made no U.S. political contributions, and I suppose that is why we object or are bothered by this characterization.

Q. In your inquiry, Mr. Thomas, and interviews and questionnaires, did you find any slush funds available to any officers of the Corporation?

A. Within the definition that I gave in my understanding of slush funds—and I am not being cautious. It is just that it is a difficult term—I did not.

Q. Now, was this inquiry that you undertook, as a result of an inquiry that the SEC had made to the Company?

A. Not at all. The SEC had not contacted us, had made no inquiry. The undertaking was entirely voluntary and started by us at our instigation.

Q. Now is a company that has registered securities and offers, stock, required by SEC law to make disclosures of this type, if it finds out there are such payments?

A. Yes.

Q. And is that the reason, that you were legally required to make the disclosure that you did to the SEC, that you made it?

A. Yes.

Q. And at the same time you made the disclosure to the SEC, you sent a copy thereof to the IRS, is that correct, or——

A. Very close.

Q. Maybe not the same time, but contemporaneous with?

A. Yes. It might have been the same day. I just don't remember.

Q. Were any of the interview notes or questionnaires submitted to the SEC?

A. No.

Q. What standard did you use in determining what amounts you would include in the disclosure to the SEC, Mr. Thomas?

A. Well, as I stated earlier, it is very difficult to determine whether a particular payment is a perfectly proper commission to a third party or it is really a payment to a third party that is going to go to a Government official. We felt that in the interest of fairness and protecting the Company interest and complying with the law, it was desirable to err in the direction of including payments, some of which I am sure did not go to Government officials, I am sure were perfectly proper payments but there was something in the background that troubled us.

Q. I believe you may have answered this, and I will take an objection to repetition if it is so, but is it not—is it your function, as General Counsel of the Upjohn Company, to also serve as General Counsel to the subsidiaries?

A. As I have stated earlier, Upjohn is a group of probably fifty corporations, and I am in fact the Chief Lawyer for all of those organizations.

Mr. Roberts: I have no further questions of Mr. Thomas.

The Magistrate: Just a moment. I think—he may have one more.

Mr. Roberts: Pardon me.

Mr. McNelis: May we have a minute, your Honor?

The Magistrate: Yes.

Mr. McNelis: Thank you.

BY MR. ROBERTS: (Continuing)

Q. Mr. Thomas, one question, and I will ask it in the framework: Are you sufficiently familiar with the tax laws to know which companies would affect the U.S. Tax Return, or is that more the function of your Tax Department?

Mr. Fink: Well, I am going to object to that, in any event, unless we have a large number of premises established as to what the facts are, all of which was the purpose of our Summons.

The Magistrate: I will take the answer to that. If he thinks he is smart enough to answer it, we will let him answer. . .

A. Certainly in this instance after conferring with both inside and outside tax experts, I feel that I am qualified to know that.

Q. And based on your conversations, have you made a determination as to whether or not what type of organizations would affect the U.S. Tax Return?

A. Yes, I have.

Q. In your opinion?

A. In my opinion.

Q. And do any of the controlled foreign corporations, the subsidiaries that are known as "controlled foreign corporations," affect the U.S. Tax Return?

A. No.

Mr. Fink: I am going to object to that, just on the general principle that here Mr. Thomas has recently equipped himself as an expert in the tax laws, by two experts, allegedly, who are not here, by a large number of unsupportable, unproved factual premises as to the nature of this. I would be perfectly prepared to, quote, "let it in for what it is worth," if anyone in the world thought that that was an admissible answer.

The Magistrate: Mr. Fink, he is only expressing his opinion, which may be right or wrong——

Mr. Fink: I hate to have to be in the trouble of cross examining him on the subject, your Honor.

The Magistrate: I will let the answer stand. It is his opinion.

Mr. Roberts: I have no further questions.

Mr. Fink: I trust he has not, however, been accepted as a qualified expert in this regard? I understand under the new Federal Rules all they have to do is state an opinion, and then I am going to waste the rest of the afternoon cross-examining him.

The Magistrate: I think that is true. Go ahead.

Mr. Fink: But he is not being accepted or proffered as an expert——

The Magistrate: No, I don't accept his testimony as an expert.

Mr. Fink: All right.

CROSS-EXAMINATION OF GERARD THOMAS
BY MR. FINK:

Q. Mr. Thomas, when did you become a vice president of the Upjohn Company?

A. I was elected Secretary and General Counsel before I became Vice President. I am not sure of the exact date. A year or two later I became a vice president.

Q. Well, let me straighten this out. You went to work for the Upjohn Company as a lawyer in the Legal Department, is that correct?

A. In 1956, yes.

Q. In 1956. At a subsequent time, '61, I believe you said, you were made General Counsel of the Company?

A. I believe I was elected Secretary and General Counsel in '61.

Q. At the same time?

A. Yes.

Q. Are the two jobs thought of as synonymous, Secretary and General Counsel?

A. No, they are two different jobs.

Q. They are two different functions. Briefly, what is the function of the Secretary of the Corporation?

A. Well, I think the duties of the Secretary of any corporation are defined in the corporate law.

Q. Have you read your job description lately?

A. I am afraid not.

Q. Okay. That seems to be a failing of all specialists.

So you don't quite know what the duties are accorded to you in the charter and bylaws, but they are somewhat different from those of being a General Counsel, is that correct?

A. Yes.

Q. You are not engaged in giving legal advice when you are recording minutes and signing the appropriate documents as Secretary, are you?

A. I think it is interesting that most major corporations, the secretary is also an attorney now.

Q. Do you feel when he is functioning as a secretary, though he is functioning, in the large sense, Secretary of a Major Corporation, he is necessarily engaging in his functions as a lawyer?

A. I think sometimes he is.

Q. And sometimes not?

A. Certainly.

Q. As a matter of fact, Mr. Thomas, sometimes we lawyers, when acting, are not acting as lawyers, isn't that correct?

A. Of course.

Q. Even though we have been approached in our professional capacity, we are not acting in the true sense of professionals, isn't that so?

A. I don't understand the question.

Q. Well, not every dealing you have with a client is a—even if a large corporate client—is what we would necessarily call part of the practice of professional responsibility, is it? You might be giving business advice, for example——

A. You might have to pick up a son up at the airport, certainly.

Q. Very frequently we are called upon for such functions, I know.

Now Vice President, when did you become Vice President; very shortly after you were made General Counsel?

A. A couple of years, I think.

Q. Well, did that entail merely a recognition of a greater position for you in the Corporation as General Counsel, or did that entail separate duties?

A. My duties did not change significantly. I think it was some recognition.

Q. Were you put on the Board at that time?

A. Yes.

Q. Though you had not previously been on the Board as General Counsel, is that correct?

A. I had sat at Board meetings as Secretary, so I was a member of the Board.

Q. And how large is your legal staff directly under you as General Counsel in the Upjohn Company?

A. Perhaps 25 persons, perhaps 25 attorneys.

Q. You are now referring to those who would be based here in Kalamazoo?

A. Yes.

Q. Are those 25 all under your immediate supervision as General Counsel?

A. Yes.

Q. Do you have a patent, a group of patent lawyers, for example?

A. I am including in my 25 our Patent Department, most of whom are attorneys. There may be three or four that aren't patent attorneys.

Q. So your count of 25 includes the patent——

A. The Patent Department.

Q. The Patent Department. How about those who are non-patent, how many do you have?

A. My numbers aren't going to quite match. About 8 of them.

Q. Okay. Are you an officer or a secertary, which includes officer, or general counsel by election or appointment of any of the subsidiaries?

A. I am an officer of some—of a few of the subsidiaries.

Q. The domestically based, or the foreign subsidiaries?

A. Both.

Q. Do you draw your salary solely from the parent Company here, or do you draw a salary from some of the subsidiaries?

A. My paycheck comes from the parent Company. I am not sure how the allocations are made within the affiliated company.

Q. Or whether there are allocations?

A. Or whether there are allocations, of course.

Q. Do any of the foreign subsidiaries have lawyers on their staff?

A. I think it is important that none of our subsidiaries have a General Counsel.

Q. Do any of them have lawyers on their staff?

A. None of our foreign subsidiaries would have lawyers. One of our U.S. Corporations does have lawyers, one of our U.S. subsidiaries does have lawyers on its staff.

Q. Which U.S. subsidiary is that?

A. Upjohn International, Inc., I believe.

Q. Upjohn International, Inc. I have seen references also to the International Division of Upjohn; is that the same thing?

A. International Division is not a precise term, and International, Inc., would be a part of the International Division, but so would lots of other things.

Q. But International, Inc., has lawyers on its staff, is that correct?

A. Yes.

Q. Though none of them have been titled "General Counsel," is that correct?

A. That's correct.

Q. Actually it was out of the International, Inc., wasn't it, that you got the first inclination of these or the first indication of these questionable payments?

A. Yes.

Q. How did you first get notice of the questionable payments? Who brought it to your attention?

A. Our outside accounting firm.

Q. Which had been engaged in an audit in a foreign country?

A. Yes.

Q. Did they bring it directly to your attention, or did they bring it to the attention of someone else within Upjohn Company?

A. They brought it to my attention as well as some other individuals in Upjohn.

Q. In Upjohn International first, and then to you?

If you don't remember, that is fine.

A. I am not sure. It all happened within a few days.

Q. Within a few days. And this was sometime in January of '76?

A. '76.

Q. That you first got word of this, is that right?

A. Yes.

Q. What immediate step did you take when you first got word of this?

A. I consulted with outside counsel. I discussed the problem with the Chairman of our Board.

Q. You discussed the problem first with the Chairman of the Board, and then with outside counsel, or vice versa?

A. Almost simultaneously.

Q. You can't remember the sequence?

A. No.

Q. Is that correct?

A. Yes.

Q. What outside counsel did you go to?

A. Initially I went to Temko of Covington and Burling.

Q. Why did you go to Mr. Temko of Covington and Burling, what was his particular specialty?

He was an SEC lawyer, wasn't he?

A. No, he really isn't. He is an attorney in a very good firm, whom I have known for a long time and have a high regard for his general good judgment. And I think I suspected that even though he himself was not a specialist in these areas, that his partners would be.

Q. And these areas, you meant the area of SEC?

A. Yes.

Q. Was that on your mind when you went to him?

A. SEC was one of the things, of course.

Q. What else was on your mind?

A. Tax problems, a possible problem in foreign countries, evasion of foreign laws, possible currency restrictions —there were really a whole string of legal problems that flow out of these——

Q. But the one that you had paramount in your mind was SEC when you went to see Mr. Temko?

A. No, I think the primary thing in my mind was the whole problem growing out of a company doing these kind of things, and I think I continued to think of it in terms of that kind of a problem.

Q. All right. But when you went to see Mr. Temko, what suggestions were there then of the SEC problems that were entailed by this discovery?

A. Well, I think in talking with him and his partners, and in view of the publicity about other companies, it appeared that in order of time the SEC problem might be first, because we obviously have an obligation to disclose to the SEC and our stockholders anything that is important.

Q. The publicity in the newspapers and elsewhere and talk about other companies dealt with what aspect of the SEC and its program with respect to these items?

A. The disclosure the companies were making to the SEC, and hence to the public.

Q. And they were making them, were they not, under some sort of assurance or suggestion from the SEC that if you came clean, while you wouldn't get immunity, you might be well treated?

A. That's correct.

Q. So when you started this investigation, in a sense, and went to see Mr. Temko, it was with the understanding, was it not, that there was going to be a disclosure to the SEC?

A. Oh, not at all. I had no idea at this time that the problem was great enough to require an SEC disclosure.

Q. Well, you had enough of an inclination or enough of an indication to know that if you ascertained a larger problem you were going to have to disclose it to the SEC; didn't you know enough at that time to know it?

A. At that time I certainly did not know enough to know that an SEC disclosure would be required. And I think

to be quite candid, we were hopeful that we would not have to make a disclosure.

Q. Why were you hopeful that you would not have to—you were hopeful what, that one episode would not be enough to justify a disclosure?

A. Yes. It was an isolated uncontrolled incident.

Q. But you were certainly going to say if you found out a large series of questionable payments, some of which you have candidly suggested might well be illegal, you were going to have to make a disclosure, weren't you? You intended to make a disclosure, you wanted to come clean, didn't you, with the SEC?

A. Well, no; we wanted to get the information on which I would make the decision whether there would be a disclosure, what kind there would, how it would be made—all those things.

Q. All right. In January, early January of 1976, you ascertained, you learned of this for the first time, and in March of 1976 you had completed enough of your investigation to have made a disclosure to the SEC, is that correct?

A. Could I just expand on that a little bit?

Q. Well, answer it first. You had completed your investigation sufficiently to enable you to make a disclosure to the SEC; you did make a disclosure, didn't you, in March of '76?

A. Is that the question?

Q. Yes.

A. Did I make a disclosure?

Q. Well, did the Company make a disclosure?

A. Yes, we did. It is a matter of record.

Q. Okay.

A. I guess that is why I don't follow your question.

Q. Well, possibly the question was a little broad.

In January you started your investigation, correct?

A. Yes.

Q. And in March you had made your disclosure to the SEC?

A. In March we made a disclosure to the SEC.

Q. Are you suggesting also you had to make a subsequent disclosure to the SEC, is that why you were hesitating when you answered my question?

A. Well, there are a couple of parts and reasons for my hesitation: One is that shortly before we made the disclosure, we had enough information so that on the basis of that information we, I, together with outside counsel, determined that that information, under the SEC law, required a disclosure.

The second reason for my hesitancy is that we were very careful in that February—or, that March disclosure to tell the public and the SEC that we were continuing to gather information, and that this was not to be read as the final—we didn't want people to think this was the end when we knew it wasn't.

Q. And so you filed an 8-K in March of '76, correct?

A. That's right.

Q. And in July of '76 you filed an amendment to the 8-K, is that correct?

A. That's correct.

Q. And in March—and the July 8-K actually increased the amount of the questionable payments over those which had been reported in March of '76, correct?

A. Correct. The March one implied there would be a later one, but it wasn't coming through.

Q. And you carried through with your disclosure promise in July of '76, is that correct?

A. Yes, sir.

Q. All right. And at—and almost simultaneously in March, you forwarded a copy of that disclosure, 8-K, to the Internal Revenue Service, or at least the Company did, did it not?

A. That's right.

Q. Actually you didn't send that information as General Counsel of the Company, did you? Who did?

A. I certainly approved sending it. I can't remember who actually mailed it.

Didn't I mail it?

Mr. Fink: Did he, Mr. Nath?

A. I think I did. It is a detail.

Q. Yes, it is a detail. I am not sure Mr. Ludlow didn't.

A. He may have.

Q. Yes.

A. I may have instructed him.

Q. Yes.

Mr. Fink: You have seen this letter. I might as well put it in the record.

(Mr. Fink handed Mr. Roberts a letter.)

Mr. Fink: I am not sure that we have marked anything, really, your Honor, as an Exhibit, though we have referred to various things, which I am assuming——

The Magistrate: You haven't, but I have got a note here when this is all over to determine what you want in as Exhibits on both sides.

Mr. Fink: All right. Well, I had assumed, though, we made reference to the Summons which was attached to the Petition, that that certainly should be an Exhibit. It is an Exhibit in the sense of being in the pleadings.

I also assumed that the items attached to Mr. Thomas' affidavit that we made reference to, if we have it all, would be—suppose I just give this a number, Petitioner's 1. Should we——

The Magistrate: Hand it to the Reporter. He will mark it for you.

Mr. Fink: Should we mark it as Petitioner's 1, your Honor, and then add some of the others later?

The Magistrate: All right.

Mr. Fink: I had, frankly, assumed, and perhaps before I rested, offered some of the evidence.

The Magistrate: We are not going to be that technical about it. If we stop talking, the Reporter can mark it as an Exhibit.

(Petitioners' Exhibit Number 1 was marked for identification.)

Mr. Roberts: No objection.

Mr. Fink: We offer, then, Petitioners' Exhibit Number 1, then——

Mr. Roberts: No objection.

The Magistrate: It is admitted.

(Petitioners' Exhibit Number 1 was offered and received in evidence.)

Mr. Fink: —at this time, solely for the purpose of showing that Mr. Ludlow forwarded on to the Internal Revenue Service——

Q. Who is Mr. Ludlow?

A. He is the Treasurer of the Company.

Q. Treasurer of the Company. All right.

Now this investigation that you conducted, between learning of this episode in January of '76 and making your initial report to the Securities and Exchange Commission, was conducted by you, is that correct?

A. Under my direction.

Q. All right. Who actually assisted you in that investigation? You have said yourself and outside counsel. Let's start with internal people. Yourself and who else, between those two guys?

A. I am just—I get confused because it's been going so long.

Q. I see.

A. My impression is that in the first two months, no one else inside the Company, no other employee assisted me except perhaps my secretary may have done some things like that.

Q. I understand. And when you said outside counsel aided you, are you referring to Mr. Temko's firm, Covington and Burling?

A. Yes. And, in fact, they assisted me a great deal, and some of the interviews were conducted by Mr. Temko, a partner in that firm, and Mr. Johnson, an associate in that firm.

Q. Those were the two individuals within that firm who assisted you, is that correct?

A. I also consulted with other members of the firm, but in terms of gathering information, they were the two men who assisted me.

Q. I am now concentrating solely on the factual gathering.

A. Yes.

Q. And you indicate some uncertainty as to whether or not they had conducted any face-to-face interviews or telephone interviews?

A. Oh, they certainly interviewed some of the—when I say I interviewed 85 people, some of those people were interviewed by them rather than by me. I was only hesitating because I can't remember whether they did any by phone. I think not. I think they did it all on a face-to-face basis.

Q. Did they go abroad with you, or on their own?

A. They did not go abroad. However, I think another attorney did make a trip to one foreign country.

Q. Another attorney from Covington and Burling?

A. No. From Lee, Toomey and Kent, our tax counsel.

Q. When did you get Lee, Toomey and Kent involved in this investigation?

A. They are our general tax counsel, and of course they are advised at the very—as soon as we realized this had tax implications.

Q. Yes, but my original recollection of your testimony, Mr. Thomas, is when you approached Mr. Temko, you had numerous ideas in mind, one of which was taxes; you didn't go see your tax counsel at that time, did you?

A. I am sure we did within a day or hours of the same time.

Q. A day or hours of that approach of yours to Mr. Temko?

A. Please give me the question again. I guess I am trying to anticipate it, and I am confused.

Q. All right. In January of '76 you learned that an episode had taken place which suggested to you the possibility of questionable payments by the Upjohn Company's subsidiary, is that correct?

A. Yes.

Q. You said your immediate action after consultation with the Chairman or perhaps simultaneously with consultation with the Chairman of the Board was to go to see Mr. Temko of Covington and Burling?

A. That's right.

Q. Did you go to see him in Washington, D.C.?

A. I talked to him on the phone and I visited him in Washington. Both.

Q. Did you on that same trip to Washington go to Lee, Toomey and Kent, or do you really remember?

A. I am quite certain we contacted Lee, Toomey and Kent within a matter of days. I think on the first trip to Covington and Burling, we visited only at Covington and Burling.

Q. And you turned over or you turned for assistance in this factual investigation to Temko, Mr. Temko and his firm only, is that correct?

A. I am hesitating because I tend to consult with several outside counsel. In this case it is true that for assistance

in gathering the information I turned primarily to them. However, I don't want to leave the impression with you that I consulted only with them. Specifically we consulted with Lee, Toomey and Kent, who are our tax lawyers. And, in fact, Covington and Burling are not generally our SEC lawyers, but Mr. Larry Koerber of McDermott, Will and Emery is our tax lawyer—I mean, our SEC lawyer, and we consulted with him pretty early on, although I don't remember the date.

Q. All right. So as best we are able to recollect now, the factual investigation leading down to the disclosure in March of '76 was conducted by you, Mr. Temko, and one associate from his law firm, is that correct?

A. That is correct.

Q. They did not, however, travel abroad; only you did, is that right?

A. That's correct.

Q. So the interviews they conducted were of people here, is that it, in this country?

A. They were of people in this country, but I think it's important to put on the record that during this period between January and July, many of our foreign-based employees were in Kalamazoo, and as they came to Kalamazoo, we interviewed them. We were anxious to get all the information we could.

Q. And you sent out the questionnaire which is attached to the affdavit that has been filed with the Court as a pleading on your behalf, that is Exhibit 3 to your affidavit, which is on file with the Court, is that correct; do you know the document I am referring to?

A. Yes, I do.

Q. That is the questionnaire we have referred to, to which you received the answers?

A. Yes.

Q. That letter went out over the signature of the Chairman of the Board, Mr. Parfet, is that correct?

A. Yes.

Q. And you got responses to that from the people you had selected?

A. Yes.

Q. How good were the responses coming in, how fast were they responding?

A. Very promptly, considering these people were overseas. This was tough information to gather, by and large. In view of a letter from the Chairman, they responded quickly.

Q. And you followed up some of those questionnaire responses with telephone interviews, is that correct? Were they complete when they came in, most of them?

A. Most of them.

Q. Did you have to call some of them up and say you have left something out or you haven't covered this adequately or what is this all about?

A. Yes.

Q. And of those, the so-called notes you were taking, is that what you were doing?

A. Well, no. Some of my interviews were really unrelated to the questionnaire. Some of my interviews were to round out the questionnaire, or the man is a Philippino and I don't understand, he doesn't write English very well. And, so, for instance—I don't like to refer to specific countries. I shouldn't do that—but, for instance, if the man who sent the questionnaire was in in a month, I would sit down and talk to him about it.

And so the interviews were both to round out the questionnaire, but some of the interviews were unconnected with the questionnaire.

Q. Now without pinpointing any given country, did any of the responses indicate that the individual responding had himself been a participant in one of these questionable payments?

A. Certainly by inference, and in most cases—in many cases the man had either been a participant or was immediately associated with the participant, perhaps as his boss.

So, the answer is yes.

Q. He might have approved of the action, et cetera?

A. And he might even have done it, yes.

Q. In other instances they were merely reporting what they had learned as a result of their own investigation prompted by your questionnaire, is that right or wrong?

A. That would have been more apt to have happened in the larger subsidiaries.

Q. Do you think it did happen in your perusal of questionnaires?

A. Some of the information and some of the replies was based on—were based on conversations—was information from people other than the one person to whom the questionnaire was directed.

Q. You said at an earlier point in this proceeding while you were a spectator rather than a witness that you don't know whether the people responding kept copies of what they sent in.

A. That's right.

Q. Were they instructed not to keep copies in any way?

A. I believe they received no instructions on this one way or the other.

Q. So they may well have copies or it is conceivable they do not, is that correct?

A. Exactly.

Q. Was anyone to whom you sent a questionnaire not even an employee of the Corporation at the time you sent the questionnaire to them?

A. No.

Q. I hand you a document which has not been marked for identification but is a foreign payments interview list, attached to the affidavit of Gerard Thomas, which is on file in this matter.

Mr. Fink: May I approach the witness, your Honor?

The Magistrate: Sure.

Q. Which says on page 5 at the asterisk: "Where employment has terminated, the termination date is indicated."

Now is this a list of the questionnaire people?

A. No.

Mr. Roberts: Objection—never mind.

Q. What is it?

A. A list of the persons I interviewed.

Q. That you interviewed?

A. Yes; not a list of the persons who received questionnaires.

Q. But a list of the people whom you interviewed while you were abroad?

A. No, not while I was abroad; the persons whom I interviewed.

Q. Some of them here?

A. Yes.

Q. Some of them abroad?

A. Yes.

May I straighten out the confusion?

Q. Go ahead.

A. The question I think we are on is were all of the persons who received the questionnaires employees of the Company. I believe they were.

Q. You believe they were. Let's be sure of that; are you sure?

A. To the best of my recollection.

Q. All right. Now, the next question is——

A. This is a list of the persons whom I interviewed, which is a different list.

Q. Indicating the foreign payments' interview list, is that right?

A. Yes. And that list includes people who were no longer —yes, I would like to look at it, but presumably people who were——

Q. Well, let me give you some, for illustrative purposes: Executive, unclassified, Warren Miller, is he someone located here, or abroad?

A. He is in the United States.

Q. He actually terminated May 31, 1976?

A. But I felt he would have information on this matter, and so I did interview him.

Q. Well, as a matter of fact, when you interviewed him, he may have been an employee of the Company, is that correct; you were conducting your interviews between January and March?

A. No, I think my interviews continued longer than that.

Q. I see. This list of interviews then extends beyond those that you took care of for purposes of the original SEC disclosure, is that right?

A. I can't recall.

Q. I see. Well, let's try another one. Francis Santiago, Vice President, Latin American Division II stationed in Venezuela. March 30—or, rather, May 31, 1973 was his termination of employment?

A. Right.

Q. That is on page 4 of your list?

A. Right.

Q. Do you remember whether your interview of him was conducted while you were there, or if you were there?

A. I wasn't in Venezuela.

Q. Do you remember whether it was conducted before the SEC disclosure of March, 1976? What I am trying to get at, very simply, are you claiming attorney-client privilege with respect to any people you spoke to who were not employees of Upjohn Company or one of its subsidiaries at the time you spoke to them?

A. Well, I think as to a person who's not employed by the Company, although I might claim a work product privilege, I would have difficulty claiming an attorney-client privilege, that's correct.

Q. Are you doing so at this point? Are any of the documents which have been spoken for in the Summons but not yet produced, do they represent interviews conducted by you with either verbatim transcripts or partial transcripts or your own notes of someone who was not employed by either Upjohn or one of its subsidiaries at the time of your interview?

Mr. Roberts: I will ask that Mr. Thomas look at the list, and he can see the dates that these people terminated. It might assist him.

The Magistrate: Why don't you hand the witness the list.

A. And it would be helpful to me, too, for the record, if I knew this is a list that I submitted of people whom I interviewed prior to the SEC filing. Is that what it is? What is this list? It would be helpful.

Q. Well, this list was attached to your affidavit, which has been filed with the Court, and says: "Paragraph 7. The inquiry which I conducted with the assistance of outside counsel, included interviews with 86 top-level management officials of the Company and its affiliates."

A. Thank you.

Q. "Interviews were conducted only with individuals who had over-all supervisory responsibility for the expenditures of a particular branch, subsidiary, division, or other operating unit of the Company, or with individuals who were substantially concerned with such expenditures.

"Eight. I made notes during these interviews. In some instances there were follow-up interviews and telephone conversations with some of the employees, and notes were made of these. These notes and memoranda contain my mental impressions, conclusions, and opinions.

"Nine. A list of each of the persons interviewed is attached hereto as Exhibit 1."

A. Thank you.

Q. Now you can understand my confusion, because I assumed you were attaching that list to say the people you had interviewed in conjunction with outside counsel, and what I assumed was in preparation for the SEC disclosure. You now tell me what with respect to my assumptions?

A. Your assumptions are correct, with one addition: That these people were interviewed not only in relation to the SEC problems, but with all of the other legal problems that might grow out of this.

Q. When do you think this list of interviewees, when did your interviews come to an end?

A. I think that list—I believe that list represents the people interviewed prior to the final filing with the SEC.

Q. In July of 1977—'76?

A. I think so.

Q. In January '76 you heard of the episode, correct?

A. Right, yes.

Q. That triggered this whole affair, right?

A. Yes.

Q. In March, the first filing with the SEC?

A. Yes.

Q. And finally a filing in July of '76, an amended 8-K with the SEC, correct?

A. Yes.

Q. So these interviews that you are referring to and the list attached to your affidavit on file with the Court were accomplished by July of 1976?

A. Yes.

Q. And that did include, did it not, some individuals who were not employees of the Company?

A. Who were ex-employees, that's correct.

Q. All right. Did you feel you were representing the individuals that you interviewed, or merely the Company?

A. Both.

Q. Did you advise any interviewee of a possible conflict of interest between your representation of them and your representation of the Company?

A. No. I may have with some. I think in general, I did not. I believe at this stage I didn't believe there was a conflict between the two.

Q. Did you advise all of the interviewees that some disclosure might be made to the Securities and Exchange Commission?

A. I do not recall.

Q. Did you advise any of the interviewees that a disclosure might be made to the Securities and Exchange Commission?

A. I am hesitating because the interview with these people was that it was confidential that I was gathering the information, and I think at the time I interviewed these people I really didn't know whether there would be a disclosure to the SEC. We were concerned, of course, about the possibility of some disclosure, but we thought, and as the case was, the SEC disclosure was a very general type of disclosure.

Q. Did you go back to any of the interviewees before you disclosed to the SEC, to advise them of the nature of your disclosure?

A. Well, I believe some of the interviewees are the top three or four executive officers of the Company. Obviously I talked to them. Obviously also I did not go to 85 people and say, "Here is the SEC filing we are making."

So I guess the answer is "some."

Q. To the extent then you might have waived any presumed attorney-client privilege between them and yourself, you did not seek their permission to do so, did you, sir?

Mr. Roberts: There has been no suggestion that there has been any waiver, your Honor.

The Witness: I don't think there is.

The Magistrate: I think it is a loaded question.

Mr. Fink: Well, it is cross-examination, your Honor.

The Magistrate: That is true.

Mr. Fink: I said:

Q. To the extent there may have been a waiver, did you not feel that you had to go back and see them with respect to the attorney-client privilege, is that right?

A. I think the disclosure to the SEC was so general that it was not a disclosure of the attorney-client privilege—or, a waiver of the attorney-client privilege.

Q. Did you go down and see the SEC?

A. Yes.

Q. When?

A. I believe twice: Once when we made the initial filing and once when we made the second filing. I think we hand delivered both of those.

Q. Did you go see the SEC before the July filing?

A. I am not sure that—I can't remember whether we went twice or once to the SEC.

Q. Were you accompanied by Mr. Temko when you visited in July of 1976 to the SEC?

A. No.

Q. Did you receive any inquiry from the SEC as to your attitude with respect to disclosure, either in writing or verbally, at any time, either in writing or verbally?

A. I believe there was a verbal discussion with the SEC, and there certainly were public communications of the fact that they would accept rather general disclosures which didn't identify individuals and countries. And I think we talked to them about that during our visit.

Q. Well, now they said they wouldn't require a public disclosure in the form of it being included in your 8-K, is that what you are saying?

A. Well, they also did not want it privately.

Q. SEC never told you that in order to participate in their voluntary disclosure program——

A. Wait.

Q. —that you had to—let me finish my question, sir. The SEC never told you that in order to have the full benefit of their SEC disclosure program you had to be willing to disclose to the Enforcement Division of the SEC the underlying data supporting your 8-K, including the names of the recipients of illegal payments; what do you remember about that?

A. I have not reviewed this prior to coming here, and you are touching a thing—I think at the time of the disclosure, that we had to make some representation. I can't remember—I believe it was in a letter, but it may have been by verbally that we would, if they felt it was necessary, maybe that—that we would make additional disclosures to their Enforcement Division. I believe the practice was and the implication was that they wouldn't press on that, they wouldn't make us do it; but as part of the voluntary program, we had to agree to do that, if they determined that was necessary.

Q. And is it your recollection that you so agreed?

A. Yes. I believe—yes.

Q. Mr. Thomas, the Company hasn't agreed to bring over to this country any individual that Mr. Nowak might want to interview, has it?

A. That' correct.

Q. You have not so agreed?

A. At this time, that's correct.

Q. Based on your own experience, including traveling abroad, it would not be easy for a representative of the United States Government to approach employees of the Upjohn Company abroad with the same facility that you might, isn't that true?

A. I really don't have an opinion on that.

Q. Well, do you know enough of the laws of some of these countries that it might well be an intrusion on their sovereignty for us to send an individual over to interview some of these people?

A. I really am not an authority on the foreign law. I know the IRS does this, and I don't know the details.

Q. Not in every country, is that correct?

A. I don't know.

Q. I see. You do feel that it is easier for you to interview an employee of the Company than it would for us, don't you?

A. I don't know.

Mr. Roberts: Well, your Honor, we have stipulated we would make them available. I don't know why it is any easier for Mr. Thomas to, under those conditions, than it is for their Agent. We will go with them to any of these countries and make the man available right there and then. It is just as easy for them to do it as it is for Mr. Thomas.

Mr. Knack: It just depends how pleasant you are, that is all.

Mr. Roberts: That is right.

Mr. Fink: If pleasantness were a passport, we would—well, I would probably have one in Arabia; but we will be careful on that. Alrightee.

Just a moment, if I may consult with co-counsel.

Mr. Roberts: I might say, if there is any problem, such as Switzerland, which I don't think we have a subsidiary in, we will bring him out of Switzerland. If there is any problem in any country like that, we will bring him to a point nearest to the country to interview him.

BY MR. FINK:

Q. Mr. Thomas, did you ever render any legal opinion in writing to the Chairman of the Board with respect to this item, you personally?

A. My practice is to advise him orally, and I cannot recall any written document.

Q. What legal advice do you believe you rendered to him in this context prior to March, 1976, and with respect to this questionable payment investigation?

Mr. Roberts: Your Honor, I object. I think this is getting into the attorney-client privilege.

The Magistrate: I am sorry; do you want to repeat the question. I was writing. I am sorry.

Mr. Fink: I asked him what legal advice—let me put it this way:

Q. Did you render any legal advice to the Chairman with respect to this investigation after you had completed it?

A. Yes.

Q. What was the nature of that advice?

Mr. Roberts: I object.

May I consult with Mr. Thomas a minute before he answers this question?

The Magistrate: Yes. Any objection, counsel?

Mr. Fink: No.

The Magistrate: All right. Go ahead.

(Mr. Roberts conferred with the witness out of the Reporter's hearing and off the record.)

Mr. Roberts: If Mr. Thomas is not forced to go into detail as to the legal advice, if he may describe generally what the legal advice, what areas it was——

Mr. Fink: I think we have a problem whenever we are talking about disclosure of attorney-client privilege, which goes back to the merits of this action. I can't take that.

The Magistrate: Well, now, I can't decide whether something is privileegd in this unless I know what it is. But if it is privileged, then you shouldn't know about it. So this is the quandary. It usually is accomplished by an in camera disclosure. I don't know whether we want to do that.

Are you satisfied with a general answer at this point, or not?

Mr. Fink: I can't say until I have heard the general answer, your Honor.

The Magistrate: May we have the general answer then?

Mr. Roberts: Yes.

Mr. Fink: Then I will either move to strike it or rest with it.

The Magistrate: Do you understand, Witness, what we are talking about?

The Witness: Yes.

The Magistrate: All right.

A. And I understand that I won't refer to the specific advice, "Do this, don't do this, you should do this," but I think the areas in which legal problems arise and legal counsel is desired, growing out of these payments, are several. I am not sure I can even remember all of them, but a couple that come to mind, one of course we have talked already about, "Does this violate the SEC laws? Are there any actions that you are required to take because of the SEC laws? Are there any obligations, legal obligations to advise your stockholder, the investing public?" That would be just starters in the SEC area. The obvious tax area, "Are there any U.S. Tax Laws that you could be violating? Are there any adjustments that the law requires in your tax return?" There are all sorts of currency controls. These are not important in the U.S., but in foreign countries, there are many currency controls, and these kinds of payments could involve those.

I think another legal area is the—and maybe this is more in the area of potential litigation. Out of these payments, a great many stockholders suits have grown up, and I think it was part of my advice and opinion to the

Company of how we should best act in order to avoid creating situations where stockholders could bring action against us.

I think also—and I don't hold myself out as a foreign attorney, but we may have more foreign than U.S. legal problems growing out of this. And certainly we talked about some of those problems. I think the currency control would be an illustration of that kind of thing. Obviously some of these payments that have been disclosed violate the laws of the foreign countries.

So there are a whole myriad of legal problems that grow out of this.

Q. Mr. Thomas, maybe we can go at it this way: Primarily the investigation that you, and apparently Mr. Temko, to some extent, assisted by his associate, conducted the investigation now as opposed to the advice was factual in character?

A. Oh, no. We were investigating what the law was and——

Q. That is not, however, the questionnaire we are after, is it? The questionnaire was a factual questionnaire, was it not?

A. Of course. I am not sure that my interviews all were, but the questionnaire was certainly factual.

Q. And many of your interviews were, in large part, factual in character, were they not; is that not correct?

A. Yes.

Q. They were, in all candor, sir, the kind of interview you were conducting about accounting matters and off book accounts, if you did such, could just as readily and perhaps with even greater insight have been conducted by an accountant or the accounting department, couldn't it have been?

A. No, I don't really think it could have. And I think that is why the decision was made not to conduct it by the accounting department or accountants. I think really the

decision was whether inside or outside counsel would conduct it.

Q. Why could it not have been conducted, to the extent of its factual nature, by the accounting department?

A. I don't think the accounting department would—see, the purpose of the investigation was to get the information on which I could render legal opinions. I don't think accountants would have known the kind of information I needed to make these legal decisions in all these areas.

Q. Suppose you had never conducted a personal interview but had to be satisfied with merely the responses which had come to Mr. Parfet's letter together with the questionnaire on it?

A. It would have been inadequate. And I think I have to add on to that, not because people were trying to deceive us, but because these are foreign people. They didn't understand, they sometimes didn't have complete records within their country, and you just needed to explore further than the questionnaire.

Q. Do you remember attending a conference with Mr. Roberts and others before this Summons' enforcement act or proceeding was brought?

The Magistrate: When, counsel?

Mr. Fink: In January 11, 1977.

A. Where was that held?

Q. In attendance—that was held in the office of Regional Counsel, Detroit, Michigan. In attendance were Gerard Thomas, Charles McNelis, Richard Roberts, and Staff Assistant Tuttle, and attorneys Thomas Ritter and Richard Witkowski, Group Manager; Joseph Lubbe, and seated here, Special Agent Joseph Nowak.

A. Yes, I remember him attending that.

Q. Do you remember any statement made by you at that conference?

A. Not specifically.

Q. With respect to whether or not you had rendered legal advice to the Chairman of the Board?

A. I can't recall. I may very well have, but I guess I don't remember.

Q. You don't remember any such statement?

A. That isn't to say I didn't make the statement. I just don't remember precisely what was discussed at that.

Q. I hesitate to refresh your recollection on something that —(to the Magistrate) in all candor, your Honor, I may not be able to myself establish, but if I may try, with permission of Counsel:

Did you at any point in that conference state—did you at any point there state that you had rendered no legal opinion or opinion letter to the Board of Directors as to their improper payments?

A. Well, that would be an incorrect—I suppose you are reading—I guess I would like to know what document you are reading from?

The Magistrate: So would I.

Mr. Fink: Well, your Honor, I wouldn't disagree.

Q. I am reading from a document that was not prepared by you.

Mr. Fink: It was prepared by three of the participants in that conference, who are not here, your Honor. I was trying to be candid about the matter, but I am not in a position to have them here.

The Magistrate: Are these Government employees?

Mr. Fink: They are, yes. Mr. Ritter, an attorney; Mr. Witkowski, an attorney; and Mr. Chauncey Tuttle, Jr., an attorney, signed this document.

Mr. McNelis: May we ask when it was prepared, your Honor?

Mr. Fink: Yes. It was prepared, according to the document, on January 19, 1977, with respect to a conference on Tuesday, January 11, 1977.

Mr. McNelis: Is counsel prepared to state whether or not there were any notes or recordings made of the conference he is referring to?

Mr. Fink: Obviously I am not prepared to state it, but I am happy to state that I am not exploring this with the knowledge that there is such a tape recording or not.

I recognized, your Honor, and tried making clear to you, that I had not intended to bring something forward before the Court that I was not prepared to prove.

The Magistrate: Well, ask your question, and if he doesn't remember, I assume he will tell us.

Mr. Fink: Yes.

Q. Did you or did you not make any statement to the effect that you had rendered no legal opinion or opinion letter to the Board of Directors? And I am not in a position, I will tell you very candidly, to disprove you if you say no.

A. No. I would not have made such a statement, because, in fact, I did render legal opinion to both the Board of Directors and to the Chairman.

Perhaps I could clarify this—and maybe this isn't the right thing to do. I may have stated that I couldn't recall any written opinion, but certainly I delivered numerous oral opinions, and I think that may be where the——

Q. Confusion may arise?

A. If I said I didn't render any opinion, that wouldn't be correct.

Q. I am not in a position to say whether you did or didn't. You are recorded as having stated, but it may be no written.

A. Yes.

Q. Would those be recorded, if you delivered them, in the minutes or records, which are really in your possession?

A. No. Our minutes merely report the action taken by the Board.

Q. They would not indicate whether or not you did——
A. They wouldn't cover comments and opinions and things of this nature.

Mr. Fink: May I have a moment?

The Magistrate: Yes.

Do you have any other witnesses, Mr. Roberts?

Mr. Roberts: One.

Mr. McNelis: Are we pushing your Honor on time?

The Magistrate: No, no problem.

Mr. McNelis: Thank you, your Honor.

BY MR. FINK:

Q. Mr. Thomas, I guess I left one thing dangling. The International Division has a legal staff of its own, is that correct?
A. There are lawyers assigned to the International Division just as there are to the Agricultural and Chemical Division. I am the chief lawyer for the whole Company.
Q. And there are lawyers assigned to the International, Incorporated, Corporation—or, Upjohn International, Inc., I guess it is?
A. Yes.
Q. All right. They have a legal staff?
A. Surely.
Q. Did you consult them in connection with this investigation?

Mr. Roberts: May he look at the list of the people he interviewed? There is a name on there.

Q. Well, that would be a factual interview. I meant, did you consult with them with respect to legal matters?
A. Let me take a minute in answering that one.
As I said initially, I consulted primarily with outside counsel and not with people in the Company. I think there

also was a decision that since this problem appeared to be primarily in the International Division, they shouldn't or wouldn't be involved in my gathering the information.

Now I think I did interview some people to get the factual thing, but I think in terms of structuring the investigation—or, the inquiry, the feeling was that it was better conducted by someone not directly assigned to the International Division.

Q. It was best conducted by someone not assigned to the International Division?

Q. It was best conducted by someone not assigned to the International Division; they would normally be more expert, I assume, in International law and in the law in foreign countries than would your parent staff, isn't that correct?

Mr. McNelis: That could be a gratuitous assumption. No foundation.

The Magistrate: Well, I will take the answer.

Are we going to have two counsel talking?

Mr. McNelis: I am sorry, your Honor.

The Magistrate: I don't care, as long as we lay the ground rules here, because——

Mr. McNelis: I will behave, your Honor. I will shut up.

Q. It may have been a gratuitous assumption; is it an accurate assumption, Mr. Thomas?

A. I do not think that the lawyers assigned to our International Division would know more about the legal problems that might be involved in these payments than the lawyers assigned to the parent division.

Q. This legal staff does not report directly to you, even though you are General Counsel; isn't that correct?

A. In that all of the people in International report to the head of International, I certainly have some very direct responsibility for them.

Q. And their expertise was not with respect to these problems that I was inquiring about, but their expertise was with respect to the law of the foreign country in which these payments had been made? They deal with that more regularly than you do, don't they?

A. Well, these are all, of course, United States lawyers, and they would not hold themselves out as being experts on the laws of the foreign countries.

Q. They might not hold themselves out as experts—I suppose none of us would—but they deal with it more often than you do, isn't that so?

A. Yes.

Q. All right. But you did not—these subsidiaries did not turn to them for legal advice in this regard, is that what you are telling us, to the International Division? They have——

A. True.

Q. They have subsidiaries, as well, do they not?

A. State your question. You have got two questions to me.

Q. Yes. Let's get this terminology straight. "International Division," you have indicated, is a broad term which will include within it, International—Upjohn International, Inc.," is that correct?

A. Yes. It really includes our foreign pharmaceutical operations, primarily.

Q. And part of the foreign pharmaceutical operations are subsidiaries owned directly by Upjohn International, Inc., is that correct?

A. No, I think not.

Q. Is that incorrect?

A. Yes.

Q. What does Upjohn International, Inc., do?

A. I think it is a service corporation.

Q. For?

A. For the foreign pharmaceutical operations. I get confused about the names of our subsidiaries, because

there are so many, and I can't identify them without a chart.

Mr. Fink: I don't think we have anything further, your Honor.

The Magistrate: All right. Mr. Roberts.

Mr. Roberts: Your Honor, I have fallen, I guess, into the error that so many of us do now and then, of not introducing documents that I feel are part of the record, because they are attached to the affidavit. But for identification purposes—and I would ask that this be identified as Respondent's Exhibit 1.

The Magistrate: Is that the foreign payments interview list?

Mr. Roberts: Yes, it is, your Honor.

(Respondent's Exhibit Number 1 was marked for identification.)

Mr. Roberts: And this be identified as Respondent's Exhibit 2. It is the letter to the foreign gentlemen and area managers that has been referred to.

For purposes of clarity, it would probably be better if that be numbered number 3, as it is to the affidavit.

(Respondent's Exhibit Number 3 was marked for identification.)

Mr. Roberts: And I would ask that this letter, this document, the letter of Mr. Parfet, the opening "Dear" without the name filled, dated January 16th, be marked for identification purposes as Respondent's Exhibit Number 2, consistent with the Exhibit Number to the affidavit.

(Respondent's Exhibit Number 2 was marked for identification.)

Mr. Roberts: The interview list is covered by a letter to Mr. Nowak. I guess technically it should be marked Exhibit 4.

The Magistrate: This can become very confusing, it seems to me, because we have different numbers here. Why don't we introduce the affidavit of Gerard Thomas——

Mr. Roberts: If I may do so, I will offer the affidavit.

The Magistrate: —with all the attachments. Is there any objection to that?

Mr. Fink: My only objection is that to the extent it be deemed self-serving and not in—I have no objection to its coming in as an affidavit submitted, but I do not wish it taken as his testimony which we have heard from the stand.

The Magistrate: Fine. I understand that, and I think that counsel, the Respondent, understands that.

Mr. Roberts: That is correct.

Mr. Fink: So it comes in with the understanding that it is merely introduced as an affidavit to identify the various Exhibits attached, et cetera, but his testimony is what we have heard?

The Magistrate: All right.

And then the Exhibits attached to the affidavit will be considered as any other Exhibits.

Mr. Roberts: As any other exhibits.

The Magistrate: All right.

Mr. Fink: Yes. I think from time to time we have referred to it as "attached to your affidavit."

The Magistrate: Mr. Reinardy, you can strike all that other marking.

Mr. Roberts: Yes.

(Respondent's Exhibits 1 to 3, which were previously marked for identification, were withdrawn and are retained in the possession of Mr. Roberts.)

REDIRECT EXAMINATION OF GERARD THOMAS
BY MR. ROBERTS:

Q. One further clarifying question. I know he did not do it intentionally; Mr. Fink referred to the list as your list of interviews. For clarification, as I understand that list, it is not only those you interviewed, but those you interviewed during your investigation, which were sometimes interviewed by Mr. Temko and Mr. Johnson?

A. That was a misstatement. Your statement is correct.

Mr. Roberts: I have no further questions.

The Magistrate: All right.

Mr. Fink: Just one.

RECROSS-EXAMINATION OF GERARD THOMAS
BY MR. FINK:

Q. Do you have in your possession all the questionnaires proposed?

A. Yes.

Mr. Roberts: Here today, you mean?

Mr. Fink: No.

The Witness: Oh, not here.

Mr. Roberts: Well, that is why I wanted to make sure.

Q. I just wanted to be sure now you have them all.

A. Yes.

Q. And you have all your notes that were the subject of this Summons?

A. Yes.

Q. Do you have any other investigatorial material that you feel falls within the parameters of the Summons that you now have?

Mr. Roberts: Your Honor, I might explain: There is one thing that I have discussed back and forth with Mr. Thomas as to whether it would be within it, and I tentatively said

no, but I would like to identify it. There are some drafts, as I understand it, of the disclosure to the SEC prior to the actual filing of the SEC. I don't think they come—I think we have furnished everything other than something like that, which culminated in a document that has been furnished. So, other than that, there is only the interviews and the questionnaires, as I understand it.

Mr. Fink: Is all that is now responsive to the subpoena—Summons we have issued; the only thing that is even possibly within its parameters, you tell me, other than what we have talked about, is some preliminary drafts of what was eventually turned in as the 8-K to the Securities and Exchange Commission, is that correct; is that what you are telling me?

Mr. Roberts: That is what I understand.

Is that right, Mr. Thomas?

The Witness: Well, I hesitate. For instance, I think I may have that questionnaire that was finally sent out. There may be some early drafts of that. I think I have some notes of phone calls with Mr. Roberts. I have some documents that were generated last week. It is hard to answer your question, but these don't relate to the investigation.

Mr. Fink: Really I think everybody has understood that this Summons, as of the date it was issued and at the time it was issued, Mr. Rogowski has said that he was aware of an investigation that you had conducted leading up to an SEC disclosure, two of them; and that is really what he was after, plus any additional materials that you might have added thereto in that time period.

The Magistrate: So I understand, early in the proceeding I think Mr. Roberts made reference to there are three categories of information. You have the questionnaires——

Mr. Roberts: The questionnaires.

The Magistrate: Mr. Thomas' notes, et cetera, of his interviews. And what was the third category?

Mr. Roberts: Those were the only two categories—well, the third category, your Honor—you are correct—is the material that he has. I don't know that he has any really that falls within it, of items that do not affect the U.S. Tax Return.

The Magistrate: According to Mr. Thomas.

Mr. Roberts: Yes, that are not part of the consolidated return.

The Magistrate: Which you want?

Mr. Fink: We want. We are not accepting their investigation. We want our own.

The Magistrate: I understand what you are talking about.

Mr. Roberts: Yes. I am not sure that there is any of that in his—is there, Mr. Thomas? Let's get it on the record. The back—any material similar to the back-up material to the payments that were filed by the seven companies that admittedly affected the U.S. Tax Return and that had been turned over to the Service, is any of that material in your files for the other countries?

A. Invoices, that kind of thing?
Q. Yes.
A. No.

The Magistrate: Well, is the Summons directed only to Mr. Thomas, or to Mr. Thomas and the Upjohn Company?

Mr. Fink: It is directed to Upjohn Company. It reads, "All files relative to the investigation conducted under the supervision of Gerard Thomas to identify payments made to employees," et cetera.

Now if there is such back-up material that was obtained, similar to the other, then of course we would say that it falls within the ambit of the Summons.

The Magistrate: I interpret the Summons as directed to both Mr. Thomas and the Upjohn Company.

Mr. Fink: And the Upjohn Company, that's correct.

The Magistrate: All right. Go ahead.

Mr. Fink: But restricted in character, presumably, not in—only in this sense: That it says, "All files relative to the investigation conducted under the supervision of Mr. Thomas."

Now if that includes back-up material for what they say are countries we don't have to look at and what we say are countries we—if you will forgive the adjective—"We darn well want to look at," we would assume that material we should have.

Mr. Roberts: Your Honor, the Summons is directed to Mr. Thomas. It is not really even directed to the Upjohn Company. I almost raised this as a response to the enforcement proceeding, but decided to let it go, because he is——

Mr. Fink: He is correct in that.

Mr. Roberts: But the Summons is, "Gerard Thomas, Vice President and Secretary of the Upjohn Company."

The Magistrate: Well, now it doesn't say "of the Upjohn Company." As I read it, it is directed to two entities; but I may be wrong.

Mr. Fink: Yes. it says, "Vice President and Secretary." Underneath it says, "The Upjohn Company."

Mr. Roberts: Well, I have never viewed it that way for this reason: I would assume that in these foreign entities that Mr. Thomas called, that they would have a file. I can't believe if I am the Chief Operating Officer of the A-B-C

Company in Argentina, a subsidiary, that I haven't made notes and maybe even dictated. We have not viewed that as coming within the summons whatsoever.

The Magistrate: Well, we won't decide that here today.

Mr. Fink: Obviously not, your Honor, though if there are such material—well, I take it that even if we were to serve a Summons today making it clear that we wanted that material brought over here, et cetera, et cetera, am I correct that we might have a response on behalf of the Upjohn Company, "Oh, no, that is not relevant, because we say it is not relevant." I guess when you decide this we will decide what we will get.

Mr. Roberts: That would be one of the responses, that it is not relevant.

The Magistrate: I assume that it would be, yes.

Mr. Fink: In that case, if your Honor decides we are within the realm of relevancy right now, we can decide how much we will get with respect thereto, I assume.

The Magistrate: Well, are we through with Mr. Thomas?

Mr. Roberts: I am, yes.

Mr. Fink: Yes.

The Magistrate: All right. Thank you, Mr. Thomas.

The Witness: Thank you.

Mr. Roberts: Mr. Creamer.

David S. Creamer,

called as a witness by the Respondents, being first duly sworn, testified as follows:

DIRECT EXAMINATION
BY MR. ROBERTS:

Q. Mr. Creamer, for purposes of the record, will you state your name and address, please?

A. My name is David S. Creamer, C-r-e-a-m-e-r, and I reside in Richland, Michigan.

Q. And what is your occupation with the Upjohn Company, sir?

A. I am presently Manager of the Corporate Tax Planning Unit.

Q. And in this Unit, what is your knowledge of the Federal Tax Laws, what is your responsibility re the Federal Tax Laws?

A. Well, two: Certainly advise the Company of all pertinent tax laws with respect to our—doing business in the United States, and certain international responsibilities.

Q. And does the Upjohn Company file what is known as a consolidated return?

A. Yes, they do.

Q. Are any of the—strike "any."

Under the framework of the Federal tax laws, are there what are commonly referred to as "controlled foreign corporations"?

A. Yes.

Q. And do the subsidiaries, some of the subsidiaries of the Upjohn Company, come within the term "controlled foreign corporations"?

A. Yes.

Q. Are you aware of any outstanding IDR issued by the international agent directed to the Upjohn Company that is unanswered, the international revenue agent?

A. No, I am not.

Q. And did the international revenue agent by IDR ask on what basis the Upjohn Company was contending that the controlled foreign corporations did not affect the U.S. Tax Return?

Mr. Fink: Your Honor, I have let this go on for awhile, and I am not sure precisely where we are headed, though we may be headed into an area that I find objectionable. I don't know. Is this gentleman being offered as an expert on tax law, is he being offered for some purported admission that the Revenue Service has made? What exactly——

The Magistrate: I think he is on here because he wants to show that controlled foreign corporations do not involve domestic tax payments, I assume.

Mr. Fink: That would be a problem though of the law that is to be construed, in which case I wonder if this gentleman is being offered as an expert on that subject. So far he hasn't been qualified as one. The line of inquiry so far seems to be, has he submitted something to a revenue officer or an international revenue officer, who is not here. And even, I might add, if such a revenue officer has expressed a legal opinion, after all, that is something eventually for the Commissioner of Internal Revenue, and it is something if somebody disagrees with the Commissioner of Internal Revenue, that we may well try in either a criminal or civil action, but I would certainly not think in a Summons' enforcement procedure.

The Magistrate: Well, you are pretty sure, aren't you, that I don't know what the answer is to this tax question.

Mr. Fink: I am equally sure that conceivably I don't know where we are headed, either.

The Magistrate: I would like some help on it. Can't we have this man testify——

Mr. Fink: Subject to a motion to strike——

The Magistrate: —with the idea that he's not—you know that I will have to eventually—I may have to eventually find out what the law on the subject is. Perhaps he can help us a little bit.

Why don't you qualify him to some extent.

Mr. Roberts: Well, I will qualify him before I ask the question I am going to ask about this, but what I am leading up to now and what I have been asking him about is there has been an outstanding question asked of Mr. Nowak whether there is or has not been an outstanding IDR, and this gentleman, who all IDR's are given to, knows of no outstanding IDR in the international area.

The Magistrate: All right.

Mr. Roberts: And that is the purpose of this line of questioning at this time.

Mr. Fink: An IDR, again, for those of us who are neophytes——

Mr. Roberts: An information document request.

Mr. Fink: Meaning that a request that our man fills out and gives to your Company conveyor belt to see if it comes back down, is that——

Mr. Roberts: Well, if you are referring to Mr. Creamer as the conveyor belt, yes.

Mr. Fink: But it is submitted to him, and he turns to come underling and says, "Will you get that document for me?"

The Magistrate: I will take the answers to the questions on this subject.

Mr. Roberts: Will you read back the question, please.

The Magistrate: If he can find it.

The Reporter: "And did the international revenue agent by IDR ask on what basis the Upjohn Company was contending that the controlled foreign corporations did not affect the U.S. Tax Return?"

Q. Was that the substance of the IDR that was submitted by the international agent?

A. There were two such requests.

Q. And will you explain the two requests, Mr. Creamer, and whether they were each answered?

A. Early in the Internal Revenue Service audit, we were assigned what is referred to as an "international special list," and the case manager of the IRS audit team requested that such international special list request from the Company, as to our opinion as to foreign payments would impact on our U.S. Tax liability. Such request was filled with this international specialist. Shortly after that time another international specialist was assigned to our case, and we got a similar request from him, and, likewise, a response was made in more detail than the original one.

Q. Mr. Creamer, how long have you been involved in the Federal Tax area?

A. Well, I have been with the Upjohn Company 17 years, and I have been in all those years, in one way or the other, been involved in tax matters at the Company.

Q. And what is your educational background, Mr. Creamer?

A. I have a Bachelor's Degree from the Ohio State University, and I attended the University of Michigan Law School.

Q. And in your period now with the Upjohn Company as opposed to the International Division, what have your functions been with that—with the Tax Department of the Upjohn Company?

A. Well, in more recent years, as I suggested earlier, as I said earlier, to advise management of pending tax legislation, the impact that it has on a company, and now—and to review many, many transactions that the Company is involved in, and to advise management of the tax implication thereof.

Q. It is part of your duties to ascertain what entities come within the consolidated U.S. Tax Return?

A. Yes.

Q. Did you assist in preparing the responses that were filed to the two IDR's?

A. Yes, I did.

Q. And did you consult with outside tax counsel in preparing those responses?

A. Yes, I did.

Q. Will you state now what those responses to the IDR's were?

Mr. Fink: Well, I am going to object, your Honor. It seems to me the very best, all this gentleman could be testifying to, when he becomes a conduit for some un-cross examined tax experts here, is that he has got a—the Company has a firm belief that it doesn't have to worry about the tax impact of questionable payments by these companies on its domestic return. I think that has been clear enough the Company so feels.

The Magistrate: Mr. Fink, I am not allowing this testimony because he is an expert in tax law. I think I can have an expert on foreign law advise the Court, but I think I have got to make up my mind, if I have to, what the tax law is; but I do want—he can testify as to why they have refused to honor the subpoena. And apparently one of the grounds is they don't have to on a controlled corporation, and that is why I am allowing the testimony, and I think I will take his answer.

Mr. Fink: All right. With that understanding.

By Mr. Roberts:

Q. Will you answer, Mr. Creamer?

A. Well, as Mr. Thomas indicated in his testimony, the Company transacts business through various corporate legal entities, transacts the foreign business through various corporate legal entities in the foreign areas. One through branches, through foreign branches of U.S. companies; the other method, through—or, foreign subsidiaries, which is commonly referred to in the tax area as "controlled foreign corporations."

The payments and the detail that we have provided to the Government during this investigation involved payments that were made from branches of—from foreign branches of U.S. companies, and such foreign branches are included in the U.S. consolidated return.

Payments made by the controlled foreign corporations by their own monies and made on their own behalf have no impact on our U.S. tax liability. The fact that there are, with one exception, which is referred to as Subpart (f), "Income," no transaction of a foreign subsidiary has any impact on our U.S. tax liability. The U.S. tax liability is triggered when a foreign subsidiary pays a dividend to the U.S. shareholder. The payments that we are referring to here have no such bearing on any type of dividend. Foreign subsidiaries, period, don't come within the U.S. tax jurisdiction.

Q. Now, Mr. Creamer, are you aware of the 1976 Tax Revision Act?

A. I am.

Q. And are you aware of the changes that that act made in this area?

A. Yes, I am.

Q. And it took the Act, did it not, to say that these payments, questionable payments, bribes, kickbacks, et cetera, would be treated as constructive dividends under the '76 Act, is that not correct?

Mr. Fink: Well, I am going to object, with the continued understanding that Mr. Roberts testifies as a legal expert, Mr. Creamer adopts the assertion; and I am not going to be prepared to argue it here, but it is coming in, as I understand it—as I understand it from what your Honor says, "for what it is worth."

The Magistrate: As his opinion of what the tax law is. It is not binding on me, and, frankly, I don't know what the tax law is in this area.

Mr. Fink: I am beginning to wonder whether we do.

The Magistrate: Go ahead and ask your question.

Mr. Roberts: Well, the Court will tell us what the tax law is.

The Magistrate: After the Court finds out.

BY MR. ROBERTS:

Q. How does the '76 Act now treat bribes, other illegal payments made by a controlled foreign corporation overseas?

A. Well, these bribes and illegal payments are provided for in a Section 162(c) of the Internal Revenue Code. The Tax Reform Act of 1976 states that the payments, illegal payments, such as bribes, kickbacks, as defined under Section 162(c) of the Internal Revenue Code, are—such payments made after November 3, 1976, are taxable to the U.S. shareholder. In other words, if—prior to the Reform Act, if a payment, an illegal payment were made in Country X by a foreign subsidiary operating in Country X, such payment would have no bearing or impact on our U.S. Tax Return. The Tax Reform Act of '76 so states that a payment of that nature now would become subject to U.S. Tax.

Q. After the response was made to the IDR to the International expert, were there any further follow-ups from the international expert on these payments?

A. No. I was told by the Case Manager, the Internal Revenue Service Case Manager, Mr. Basiac (spelled phonetically), that the replies to the information document request that was supplied by me was sufficient, and there was no further followup.

Mr. Roberts: I have no further questions.

The Magistrate: Is the '76 Act retroactive at all as far as this issue us concerned?

The Witness: No. As far as this issue is concerned, your Honor, it is effective 30 days after the President signed the bill, which the President signed on October 4.

So as far as this issue is concerned, it is payments made after November 3, 1976.

Mr. Fink: Well, some cross, your Honor, with the understanding I don't think the direct is proper. As long as we are going to try clarifying opinions of the law, I guess we better have it out.

CROSS-EXAMINATION OF DAVID S. CREAMER
BY MR. FINK:

Q. The regulations provide that a controlled foreign corporation is supposed to keep certain records?

A. Yes, sir.

Q. And do the regulations provide that those records are supposed to be made available to any examining agent?

A. Yes.

Q. Even though you would think that you didn't have any reportable subpart (f) income, you are supposed to have records, aren't you, from which the Revenue Service can verify your assertion?

A. Yes.

Mr. Roberts: I might say, your Honor, if such a request is made for the books of account, which is the way the statute reads, they will be provided.

Mr. Fink: "Records," is says.

Mr. Roberts: It says "books of account." Mr. Thomas says "notes of interviews and stuff are not the records of that controlled corporation," and what not; and that is what this law suit is all over, is getting his notes and questionnaire.

Mr. Fink: The sum of the Summons is over having an investigation of the tax affairs of Upjohn Company and

its subsidiaries, whether they are called foreign controlled subsidiaries or not.

The investigation, your Honor, is respectfully one we think should be conducted by the Revenue Service and not decided by Upjohn.

The Magistrate: Let's direct the question to the witness and not to me.

Mr. Fink: Very good.

Q. There are such requirements that there be records and documents made available, and whether or not this so-called "Subpart (f) income," is that not right, reportable subpart (f) income?

A. Yes, sir.

Q. Assuming the following hypothetical—I am not asking you to accuse your Company of anything, but assume the following hypothetical:

That a controlled foreign company located in another country creates an off-book account—do you know what I mean by an Off-book account?

A. Yes.

Q. Not shown on its records, from which is disburses funds in that country for the benefit of its American parent. Would that have a tax impact on the domestic tax return of that parent?

A. In my opinion, yes.

Q. As a constructive dividend?

A. That could be one approach, yes.

Q. One approach.

The Magistrate: Are you talking about one period of time; any time?

Mr. Fink: Any time prior to '76.

The Magistrate: All right. Just so I understand.

Q. Assume another hypothetical. Assume that a parent company selling to a foreign subsidiary, either directly or

indirectly, so sets up its pricing structure that it is really selling to that foreign subsidiary, directly or indirectly, and an artificial price designed to shift profits into that country and keep them away from this country; would that have an impact on the domestic tax return? Could it have an impact?

A. In my opinion, yes.

Q. The Commissioner of Internal Revenue would have numerous devices, would he not, for re-allocating that income?

A. Yes.

Q. Now let's get to the more precise proposition, perhaps, of what was true prior to the Tax Reform Act of 1976. There was debate, was there not, among scholars and others, as to whether or not an illegal payment made in a controlled foreign corporation represented a reduction in the earnings and profits of that corporation?

A. That is a fair statement, yes.

Q. And it is the resolution of that debate, is it not, which determines whether or not the illegal payments made prior to the Tax Reform Act of 1976 could have an impact on your domestic return?

A. No, I don't believe that is correct, sir.

Q. Why not?

A. As I mentioned earlier, U.S. tax is triggered when a foreign subsidiary pays a dividend, and the debate whether or not such a questionable payment reduced the earnings and profits of a foreign subsidiary would be academic as long as such subsidiary did not pay a dividend.

Q. I should have added, of course, the proposition that they made that distribution on behalf of the parent.

A. Under those circumstances, yes.

Q. Yes. So that debate would have to take place.

Now, if the Commissioner's investigation conducted pursuant to this Summons disclosed any of the factual patterns I have hypothesized here or gave leads to such patterns,

you have agreed with me, have you not, sir, that there could be an impact on your domestic tax return?

A. Yes, I have.

Mr. Fink: I have nothing further.

Mr. Roberts: I have no further questions.

The Magistrate: Thank you.

Mr. Roberts, anything further?

Mr. Roberts: I have nothing further, in response to the Court.

The Magistrate: Are you through, Mr. Fink?

Mr. Fink: May I have a moment with my co-counsel?

The Magistrate: All right.

Mr. Fink: Your Honor, I guess we did mark as Petitioners' 1 that letter, and even though the Summons is attached as an Exhibit to our Petition, may I have that marked Petitioners' 2?

The Magistrate: That is a good idea.

Mr. Fink: All right.

(Petitioners' Exhibit 2 was marked for identification.)

The Magistrate: Is there anything else you want marked at this time, either side?

Mr. Roberts: No, your Honor.

There is one—there is a motion for expedited discovery, which has not been acted on, and interrogatories to the Petitioner, and request to produce.

Mr. Fink: You recall, your Honor, that just prior to this hearing we were served—you may not—I assume you have it in the file—we were served with a—what counsel, with some degree of advocacy, referred to as a "Motion to Ex-

pedite Discovery," what I would have called a "Motion to Shorten Time," in which he sought discovery by way of interrogatories and motions to produce, which, if you will examine them, your Honor, would look quite a bit into our files, as such.

We wrote a brief in opposition pointing out that the better way of authority has suggested that there is no right to discovery in a summons' enforcement matter, unless one first comes home with some showing of absence of ligitimate purpose and that sort of thing.

It seems to me the discovery to an extent has been conducted right here. Only if your Honor feels that they have made any sort of showing about an absence of ligitimate purpose in this Summons, enough to justify discovery, would that now somewhat out-dated motion have any relevance at all.

The Magistrate: Well, the motion has become moot in this sense: You wanted discovery before this hearing. Now of course you have had the hearing now. Why don't I consider those motions in connection with the merits of the case?

Mr. Roberts: Okay. I think that is correct, your Honor.

Mr. Fink: Is there anything further you want from us?

The Magistrate: Now do you want—let me ask you: The summary sheet I was shown at the inception of this hearing, is that the actual 8-K report, or not?

Mr. Fink: No.

Mr. Roberts: No.

The Magistrate: Okay. What is it?

Mr. Fink: I am told it was a schedule provided to the investigators by Upjohn.

Mr. Roberts: This is a schedule, your Honor, provided to the investigator by the Upjohn Company setting forth

the items that, in the Upjohn Company's view, through the years '71 through '76 would have impacted on the Federal Tax Return.

The Magistrate: Is there a similar list for the payments that do not have an impact on the Federal Tax Return, in a more abbreviated form? Did I understand that there was such a list?

Mr. Fink: I heard such testimony myself. I may have even elicited it, but I am not sure, your Honor. There was one furnished to the Revenue Service, yes.

The Magistrate: That is what I am talking about. Is that available?

And my next question is, should either of these be an Exhibit in this proceeding?

Mr. Fink: Well, I think counsel was somewhat reluctant to put this schedule in, and so far as I was concerned, I used it only, your Honor, to make clear with the witness precisely how little or how sketchy what had been turned over was.

The Magistrate: I see. Mr. Roberts, is there some way——

Mr. Fink: If you would like it under seal, I have——

Mr. Roberts: I would have no objection if it is under seal, your Honor.

The Magistrate: That was my next question. All right. Why don't we do that. It might be helpful. I really don't know at this point.

Mr. Roberts: I don't either, your Honor.

Mr. Fink: If you would like us also to produce for under seal the other——

The Magistrate: I think it would be advisable to do that.

Mr. Fink: That you have such. All right. Those will be for your Honor's in camera inspection under seal for any——

The Magistrate: Is there any sense in having the 8-K and amended 8-K?

Mr. Fink: I think that it might be advisable, your Honor. I have only the original 8-K. P-3, I would make that——

The Magistrate: Mr. Roberts, do you have any objection to that?

Mr. Fink: And if we could substitute or add at a subsequent time the amended.

The Magistrate: Let's see if Mr. Roberts has any objection to that.

Mr. Roberts: Beg your pardon?

The Magistrate: Do you have any objection to introducing as an exhibit the 8-K report and the Amended 8-K report?

Mr. Roberts: No, I do not.

The Magistrate: Let's do that.

Mr. Fink: It is hardly legible.

The Magistrate: Why don't you furnish me when you can some legible copies of those two documents.

Mr. Fink: Well, I think this is all we have.

The Magistrate: Oh, I see. All right.

Mr. Fink: Now if they have—I don't have an objection. This is P-3, your Honor, which would—Petitioners' Exhibit 3, which would be the original 8-K for the month of March, '76.

The Magistrate: And where is the Amended?

Mr. Roberts: We will submit a clear copy by mail. Mine happens to be marked up, your Honor, or I would withdraw it and make it a copy now. But we will submit a clean copy that is clear.

Mr. Fink: Of both the original 8-K submission and the Amended one?

Mr. Roberts: And the Amended one.

Mr. Fink: I would appreciate if you could furnish us in Washington with a copy of the Amended one, because we don't have it.

The Magistrate: Mr. Reinardy, when those come in, how should we mark them?

Mr. Roberts: You don't have it? It was furnished.

The Magistrate: Just a minute. Just a minute, gentlemen.

Jim, how should we mark those when they come in?

(Discussion was had off the record.)

(The referred-to Amended Form 8-K will be marked as Petitioner's Exhibit 4 when it comes in.)

The Magistrate: Anything further?

Mr. Roberts: Your Honor, I might point out that the Company feels very strongly these listings should not be made public in any way, and I understand that they will be sealed.

The Magistrate: That's right.

Mr. Roberts: And will be returned to whichever party—this one will be submitted now under seal.
Are you going to draft or copy the——

Mr. Fink: I am going to find out which it is. I am currently informed it is this (referring to a document), is this correct?

Mr. Knack: I suppose, to save the Court's time—and I will work with my counsel from Washington, and I personally will deliver to the Court both of those documents.

The Magistrate: All right. Let's do it that way.

Mr. Roberts: This is it without one very important part to it: The country is not identified. Now I don't know whether we did furnish the Revenue Service a listing of the country, as well, on each of these pages, your Honor. There is a country number one, not each of the pages, but the pages beginning "country one." It goes through to whatever the final number is, with no identification of the country.

The Magistrate: All right. Let's do it this way: Mr. Knack as local counsel will furnish me these two other—there are two reports, aren't there?

Mr. Roberts: Two reports, yes.

The Magistrate: And they will be designated Respondent's Exhibits 4 and 5 when they come in.

(The referred-to documents will be marked for identification as Respondent's Exhibits 4 and 5 when they come in.)

(As Respondent's Exhibits 1, 2, and 3 marked for identification earlier on in the proceedings having been withdrawn by Mr. Roberts, the two referred-to documents, when they come in to the Magistrate, will be marked for identification as Respondent's Exhibits 4 and 5, respectively.)

The Magistrate: And will you furnish a copy, Mr. Knack, to Mr. Fink?

Mr. Knack: Yes, sir.

Mr. Fink: And they will be held under seal by the Court, but, nonetheless——

The Magistrate: That is my understanding. Only those two Exhibits, Exhibit 4—Respondent's Exhibits 4 and 5.

Mr. Fink: That's correct, your Honor.

The Magistrate: Now do you want to help me with some briefs in this matter?

Mr. Roberts: I will be happy to do so.

The Magistrate: Why don't each of you get a copy of the transcript.

Mr. Fink: We thought that we——

The Magistrate: And file a brief and—what, how much time do you want?

Mr. Roberts: Do you want proposed findings with the brief?

The Magistrate: It might be helpful.

Mr. Fink: Your Honor appreciates that both sides have briefed it somewhat as a trial matter, and now the facts have perhaps been a little better developed.

The Magistrate: I think they have.
How much time after you receive the transcript would you want?

Mr. Roberts: What time do you want? You are the Petitioner and the moving party.

Mr. Fink: Well, you understand with us speed in the enforcement of Summons is an important, and procrastination in the preparation of briefs is fink.

Mr. Roberts: "Is fink," did you say?

Mr. Fink: That was my attempted humor.
What do we need, Mr. Nath?

Mr. Nath: Two weeks will be suffice.

Mr. Fink: Two weeks, fine. I have Mr. Nath working and not I.

The Magistrate: After you receive the transcript?

Mr. Fink: After receipt of the transcript. Preferably in Washington after receipt of the transcript.

The Magistrate: That is enough time?

Mr. Nath: Yes, your Honor.

The Magistrate: Fine.

Mr. Roberts: I would say two weeks after we receive their brief to respond.

The Magistrate: All right.

Mr. Fink: And we get to reply, of course, to their affirmative defenses.

The Magistrate: Well, I don't want, you know, briefs coming in by the bushel.

Mr. Nath: Your Honor, I would suggest a simultaneous briefing schedule.

Mr. Fink: We are willing to give a simultaneous briefing schedule.

The Magistrate: Why don't we do this: A simultaneous briefing and a reply brief ten days thereafter, and stop there.

Mr. Fink: Very good. After receipt of the transcript in Washington, good enough. Thank you.

The Magistrate: All right. Thank you, gentlemen. It is nice to have competent lawyers before the Court. Thank you very much.

Mr. Roberts: Thank you, your Honor.

(At 5:30 p.m. on Wednesday, October 12, 1977, the proceedings were concluded.)

REPORTER'S CERTIFICATE

I, James L. Reinardy, Official Court Reporter for the United States District Court for the Western District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a full, true and correct transcript of proceedings had in the within-entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

/s/ JAMES L. REINARDY 11-6-77
James L. Reinardy, CSR-RPR
U.S. District Court Reporter
652 Federal Building
Grand Rapids, MI 49503

[Filed as Exhibit to Transcript of Proceedings:
November 8, 1977]

March 26, 1976

Mr. Roy Little
Internal Revenue Service
1800 Cadillac Tower
Detroit, Michigan 48226

Dear Roy:

As we indicated to you last Friday, the company plans to file a Form 8-K covering "improper payments" with the S.E.C. sometime this week. We have now determined the date for the filing as Friday, March 26, 1976. A copy of the Form 8-K is enclosed.

You'll notice, based on the preliminary results of the investigation, payments have been identified in twenty two countries. Since January 1, 1971 the total amount of these payments has been $2,710,000 (an amount somewhat larger than we indicated to you) and relates to sales which are estimated to be $27,069,000.

Roy, for now and until the final results of the investigation and survey are fully known, we would prefer to limit our reporting to the figures contained in the Form 8-K, although we realize fully we will ultimately have to provide you with amounts country by country. We do know that a couple of branches of our Western Hemisphere Corporations were involved in such payments and we recognize that these payments create tax problems.

We will continue to keep you posted concerning the results of our investigation. Likewise, as you formulate your plans, please let us know what will be required of us.

Sincerely,

C. H. Ludlow

gw
Enclosure

cc A.R. Lincoln
G. Thomas
J.P. Casey

[Filed as Exhibit to Transcript of Proceedings, November 8, 1977]

"EXHIBIT 1"

SUMMONS

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE

In the matter of the tax liability of
THE UPJOHN COMPANY
7000 Portage Road
Kalamazoo, Michigan 49001
Internal Revenue District of Detroit
Period(s) 1972, 1973, 1974

The Commissioner of Internal Revenue

To Gerard Thomas, Vice President and Secretary
The Upjohn Company

At 7000 Portage Road, Kalamazoo, Michigan 49001

Greetings: You are hereby summoned and required to appear before James M. Rogowski, an officer of the Internal Revenue Service to give testimony relating to the tax liability or the collection of the tax liability of the above named person for the period(s) designated and to bring with you and produce for examination the following books, records, and papers at the place and time hereinafter set forth:

The following records of the Upjohn Company:

All files relative to the investigation conducted under the supervision of Gerard Thomas to identify payments to employees of foreign governments and any political contributions made by the Upjohn Company or any of its affiliates since January 1, 1971 and to determine whether any funds of the Upjohn Company had been improperly

accounted for on the corporate books during the same period.

The records should include but not be limited to written questionnaires sent to managers of the Upjohn Company's foreign affiliates, and memorandums or notes of the interviews conducted in the United States and abroad with officers and employees of the Upjohn Company and its subsidiaries.

Place and time for appearance:

at Rm. B-41, Federal Building, 410 W. Michigan Avenue, Kalamazoo, MI 49005 on the 7th day of December, 1976 at 11:30 o'clock A.M.

Failure to comply with this summons will render you liable to proceedings in the district court of the United States or before a United States commissioner or magistrate to enforce obedience to the requirements of this summons, and to punish default or disobedience.

Issued under authority of the Internal Revenue Code this 23rd day of November, 1976.

Attested Copy

JAMES ROGOWSKI, Special Agent
Signature, Title

Form 2039 (Rev. 2-74)

Internal Revenue Service

Authorized By: JASON R. GUDDE, Group Manager
Signature, Title
Prior Authorization Received From:
Name, Title
On

Date

Signature Issuing Officer

CERTIFICATE OF SERVICE OF SUMMONS

(Pursuant to Section 7603, Internal Revenue Code)

I certify that I served the summons shown on the front of this form on:

Date—November 23, 1976. Time—11:45 a.m.
How Summons Was Served:

☒ I handed an attested copy of the summons to the person to whom it was directed.
GERARD THOMAS

☐ I left an attested copy of the summons with the following person at the last and usual place of abode of the person to whom it was directed.

RICHARD C. VERVISCH, Special Agent
Signature, Title

Sec. 7603—Service of Summons

A summons issued under section 6420(e)(2), 6421(f)(2), 6424(d)(2), 6427(e)(2), or 7602 shall be served by the Secretary or his delegate, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

[Filed as Exhibit to Transcript of Proceedings:
November 8, 1977]

1-4147-2 Orig.

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

Form 8-K

SECURITIES AND EXCHANGE COMMISSION
Received March 26, 1976
OFFICE OF REGISTRATIONS & REPORTS

CURRENT REPORT

Pursuant to Section 13 of the
Securities Exchange Act of 1934

For the Month of March, 1976

THE UPJOHN COMPANY
(Exact name of registrant
as specified in charter)

7000 Portage Road, Kalamazoo, Michigan 49001
(Address of principal executive offices)

INFORMATION TO BE INCLUDED IN REPORT

Item 13. Other Materially Important Events.

In January, 1976, the management of the Company learned that in two foreign countries payments were being made to government employees, or to third parties believed to be acting as intermediaries for government employees, for the purpose of securing government business. Management immediately ordered the cessation of these payments and initiated an investigation commencing with the period beginning January 1, 1971, to determine whether other payments had been made and whether any Company funds or assets had been improperly accounted for on the Com-

pany books. This investigation is being conducted under the supervision of the Company's General Counsel with the assistance of outside legal counsel.

The investigation so far has involved interviews in the United States and abroad with 45 officers and employees of the Company and its subsidiaries and examination of certain relevant files and records of the Company available in the United States. A written questionnaire was also sent to the managers of the Company's 53 foreign subsidiaries.

The Company's worldwide sales in 1975 were $890,771,000. Total worldwide sales for the years 1971 through 1975 were $3,282,553,000. Since January 1, 1971, there have been payments totaling $2,710,000 which were related to sales estimated to be $27,069,000, or less than 1% of the Company's total sales during this period. All of these payments were made for the purpose of securing sales to government agencies or instrumentalities. Because of common and long-established business practices in certain countries, the managers of some subsidiaries felt that payments of this type were necessary to compete successfully for government business. In addition, payments since 1971 totaling $26,200 were made in connection with other foreign governmental actions related to the Company's foreign business. Although most of these payments were made to persons who may be serving as intermediaries for employees of foreign governments, some of them were made directly. There were payments in 22 of the 136 countries which the Company serves. Small payments were also made to minor government employees to expedite governmental services to which the foreign subsidiaries were entitled.

No corporate political contributions of any kind in the United States or in any foreign country have been discovered.

None of the outside Directors had any knowledge that the Company was engaged in any questionable transac-

tions or practices until the meeting of the Board of Directors on February 17, 1976.

No Director approved any direct payments to a government employee. However, certain inside Directors and officers associated with international operations, approved or had knowledge of payments to third parties who it now appears may have made payments to foreign government employees.

The Company's Board of Directors was informed at its meeting on February 17, 1976 of the problem in two foreign countries and at its meeting on March 16, 1976, it was given additional information. At the February meeting the Board was advised that the General Counsel of the Company, with the assistance of outside counsel, had been instructed to conduct a thorough investigation of the matter. At the March meeting, the Board reviewed and approved the steps taken in the investigation and the "Statement of Policy", set forth as Exhibit A hereto.

The Company has notified the Internal Revenue Service of its investigation and has taken steps to assure that no improper United States tax deduction will result for the year 1975. The Company will confer with the Internal Revenue Service with respect to prior federal income tax returns.

This investigation is still in progress and this statement is based on the information gathered up to this time. At the conclusion of the investigation, the results will be reported to the Board and an appropriate report will be filed with the Securities and Exchange Commission.

The management of the Company is of the opinion that the payments described above have not been, individually or in the aggregate, material to the Company's business or financial position considered as a whole. Although the termination of these payments may limit the ability of the Company to compete in some foreign countries, manage-

ment is of the opinion that any adverse effect will not be material to the overall financial position and business of the Company.

On March 10, 1976, the Company disseminated to Upjohn employees worldwide the "Statement of Policy" (Exhibit A hereto) stating the Company's policy of strict compliance with all laws and regulations and specifically prohibiting illegal or improper payments from corporate funds or assets.

In accordance with the practice of other corporations reporting matters of this type, the Company is voluntarily making this current report under the heading "Other Material Events" on Form 8-K. As indicated above, the Company does not view these matters to be material, and their disclosure herein is not an admission of materiality.

Item 14. Financial Statements and Exhibits.

(a) Financial Statements:
None

(b) Exhibits:

Exhibit A—General List Notice dated March 10, 1976 entitled "Policy on Political Contributions, Payments to Government Personnel and Proper Accounting Practices"

SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, the Registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

THE UPJOHN COMPANY REGISTRANT

/s/ By GERARD THOMAS
Gerard Thomas, Vice President
and Secretary

Dated: March 26, 1976

EXHIBIT A

GENERAL LIST NOTICE

Subject: Policy on Political Contributions, Payments to Government Personnel and Proper Accounting Practices

Date: March 10, 1976 E-6

POLICY

Upjohn will comply with all laws and regulations. In addition, Upjohn will conduct its affairs in accordance with those high ethical standards historically maintained by the company.

Upjohn will make no payments for non-government use to employees or officials of any government. Upjohn will make no political contribution to individuals or political parties, even where such contributions may be legal.

EXPLANATION

1. Coverage

This policy applies to The Upjohn Company and any subsidiary or affiliate which it controls. It applies to Upjohn's dealings with governmental units and governmental officers or employees at all levels.

2. Third Party Payments

Sales commissions or other payments to third parties will not be used as a subterfuge for bribes or illegal payments. All payments to distributors, agents or other third parties must be proper and legal.

3. Gratuities, Tips and Gifts

Upjohn policy does not prohibit customary gratuities, tips and gifts. However, these shall not exceed $100 per year to any individual and his family.

PROCEDURE

1. Record Keeping

Accurate financial records must be maintained and recorded in our books in accordance with accepted accounting principles. Payments should be acknowledged by receipts from individuals with apparent authority to receive payments. No fund for any purpose shall be established which is not accurately recorded on the regular company books.

2. Compliance

Any future agreements with foreign distributors, agents or other third parties and any significant modifications in existing agreements, including any payments or discounts not required by the agreements, must be approved by a company attorney in Kalamazoo.

All managers are responsible for insuring the enforcement of and compliance with this policy, including that distribution necessary to insure employee knowledge and compliance.

Any violations of this policy are to be reported immediately to the company's Treasurer or General Counsel in Kalamazoo.

Managers may be required periodically to certify in writing that they have no knowledge of any violations of this policy which have not been reported to the company's Treasurer or General Counsel.

Any questions regarding the implementation of this policy should be referred to the company's General Counsel.

Henceforth, intentional violation of this policy will constitute grounds for dismissal.

R. T. Parfet, Jr.

No Bulletin Posted
Distribution: Kalamazoo
All DC/SA Supervision
ds1 Homemakers' Managers

[Filed as Exhibit to Transcript of Proceedings:
November 8, 1977]

4147-2 Orig.

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

Form 8

AMENDMENT TO APPLICATION OR REPORT

Filed pursuant to Section 12, 13 or 15(d) of
THE SECURITIES EXCHANGE ACT of 1934

THE UPJOHN COMPANY
(Exact name of registrant as specified in charter.)

Amendment No. 1

SECURITIES AND EXCHANGE COMMISSION

Received July 29, 1975

OFFICE OF REGISTRATION & REPORTS

The undersigned registrant hereby amends the following items, financial statements or exhibits or other portions of its CURRENT REPORT FOR MARCH, 1976 on Form 8-K as set forth in the four pages attached hereto:

Item 13. *Other Materially Important Events.*

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this amendment to be signed on its behalf by the undersigned, thereunto duly authorized.

THE UPJOHN COMPANY

/s/ By GERARD THOMAS
Gerard Thomas, Vice President,
Secretary and General Counsel

Dated: July 28, 1976

Item 13. Other Materially Important Events.

In its Current Report on Form 8-K for the month of March, filed March 26, 1976, the Company disclosed that it was conducting an investigation to identify payments to employees of foreign governments and any political contributions made by the Company or any of its affiliates since January 1, 1971 and to determine whether any Company funds or assets had been improperly accounted for on the Company books during the same period. This investigation has been conducted under the supervision of the Company's General Counsel with the assistance of outside legal counsel. This Current Report describes the results of the investigation.

At the time the Company filed its Current Report for March a written questionnaire had been sent to the managers of the Company's 53 foreign affiliates, interviews had been conducted in the United States and abroad with 44 officers and employees of the Company and its subsidiaries, and certain relevant files and records of the Company had been examined. Since that time all of the Company's foreign affiliates have responded to the questionnaire, either orally or in writing, 42 additional interviews have been conducted, and a further review of Company files and records has been made.

In the initial report filed with the Securities and Exchange Commission on March 27, 1976, the Company stated that, although the investigation was still in progress, the information at that time indicated that since January 1, 1971, payments totaling $2,710,000 had been made to employees of foreign governments, or to persons who appear to have been serving as intermediaries for such employees, for the purpose of obtaining sales to government agencies or instrumentalities. Further investigation has disclosed additional payments of this type of $914,000. In addition questionable payments of $474,000 were made to numerous non-governmental hospital employees during the five-year

period in one foreign country. Thus the total payments related to sales are $4,098,000. Some of these payments were not related to specific sales and the amount of some other sales can only be estimated. The aggregate of the actual and estimated sales to which payments can be related, however, is approximately $46,769,000. In addition, since 1971 payments totaling $147,579 have been made in connection with other foreign governmental actions related to the Company's foreign business. The Company has not determined the legality of the payments described in this paragraph under the applicable foreign laws. Small amounts which were paid to minor government employees to expedite governmental services to which the foreign subsidiaries were entitled are not included in the above totals.

It has also been discovered that political contributions totaling $370 were made in two foreign countries where such contributions are legal.

Twenty-nine of the approximately 150 countries which the Company serves were involved in the payments described above. The amount of sales related to these payments is approximately one and a half percent of the Company's total worldwide sales for the years 1971 through 1975 of $3,282,553,000.

None of the Company's outside directors had any knowledge that the Company was engaged in any questionable transactions or practices until the meeting of the Board of Directors on February 17, 1976.

Certain officers and inside directors associated with international operations approved or had knowledge of payments under circumstances indicating that the payments either were, or might have been, for foreign government employees.

Some of the payments referred to above were included in the Company's consolidated United States tax return and were deducted by the Company for federal income tax

purposes. The Company will file amended federal income tax returns for the years in which such payments were deducted and will pay such additional taxes as result from such amendments. The Company has been advised by the Internal Revenue Service that it is conducting an investigation for possible criminal violations or civil penalties arising under provisions of the Internal Revenue Code. It is not expected that this investigation will result in additional tax or penalties which would be material to the Company.

No fund or asset of the Company has been discovered in the course of this investigation which does not appear on the Company books. The payments described above were recorded on the books of the subsidiaries and branches involved under various accounts, which, in some instances, did not provide an adequate description of the purpose of the payment.

Since February at its regular monthly meetings, the Company's Board of Directors has been advised of the progress of the Investigation.

As stated in the Company's Current Report for March, the management of the Company is of the opinion that the payments described above have not been individually, or in the aggregate, material to the Company's business or financial position considered as a whole. Although the termination of these payments may limit the ability of the Company to compete in some foreign countries, management is of the opinion that any adverse effect will not be material to the overall financial position and business of the Company.

The Company is voluntarily making this amendment to its Current Report on Form 8-K filed on March 26, 1976, under the heading "Other Materially Important Events." As indicated above, the Company does not view these matters to be material, and their disclosure herein is not an admission of materiality.

[Filed: February 23, 1978]

UNITED STATES OF AMERICA
IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

No. K77-7 Misc. CA 4

UNITED STATES OF AMERICA and DAVID E. NOWAK,
Special Agent, Internal Revenue Service,
Petitioners

v.

UPJOHN COMPANY and GERARD THOMAS,
Vice President and Secretary,
Respondents

REPORT AND RECOMMENDATION OF MAGISTRATE

This is a proceeding to enforce an Internal Revenue Service summons issued on November 23, 1976 by a special agent of the Internal Revenue Service to the Upjohn Company (herein called the Company) and Gerard Thomas, its Vice President and Secretary.

The summons was issued pursuant to section 7602 of the Internal Revenue Code of 1954, 26 U.S.C. § 7602, which provides:

> "For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

"(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

"(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

"(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry."

Following the respondents' refusal to comply with the terms of the summons, a petition to enforce the summons was filed in this court pursuant to sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954, 26 U.S.C. §§ 7402(b) and 7604(a).[1]

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[1] Section 7402(b) provides:

"(b) To enforce summons.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data."

Section 7604(a) provides:

"(a) Jurisdiction of district court.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district

On August 31, 1977, an order to show cause was entered directing the Company and Gerard Thomas to show cause why they should not be compelled to obey the summons. A hearing was scheduled for September 26, 1977, which was adjourned to October 12, 1977 by agreement of counsel. A hearing was held before the undersigned on the adjourned date.

The summons directed the Company and Mr. Thomas to appear before James M. Rogowski, an officer of the Internal Revenue Service, to give testimony relating to the tax liability of the Company for the years 1972, 1973, and 1974, and also to produce for examination the following records of the Company:

> "All files relative to the investigation conducted under the supervision of Gerard Thomas to identify payments to employees of foreign governments and any political contributions made by the Upjohn Company or any of its affiliates since January 1, 1971 and to determine whether any funds of the Upjohn Company had been improperly accounted for on the corporate books during the same period.
>
> "The records should include but not be limited to written questionnaires sent to managers of the Upjohn Company's foreign affiliates, and memorandums or notes of the interviews conducted in the United States and abroad with officers and employees of the Upjohn Company and its subsidiaries."

The Company and Mr. Thomas refused to produce the records referred to in the summons on the ground that the records were shielded from disclosure by the attorney-

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court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data."

client privilege or the work product doctrine, and that the standards required for judicial enforcement of the summons had not been met.

Findings of Fact

The Company is a multinational corporation engaged in the manufacture and marketing of pharmaceuticals. It does business in approximately 150 foreign countries both through foreign subsidiaries and foreign branches of United States subsidiaries. Its worldwide sales in 1975 were over 890 million dollars (Petitioner Exhibit 3, Tr. 63). The Company files a consolidated federal income tax return with some of its subsidiaries, but some of its foreign subsidiaries or affiliates are not included in that return. (Tr. 11)

Mr. Thomas is a Vice President, Secretary, and General Counsel of the Company. He is also a member of its Board of Directors and serves as an officer of some of the subsidiaries. (Tr. 62, 77)

In January 1976, the Company's outside auditors, in the course of auditing one of the Company's foreign subsidiaries (Upjohn International Inc.), discovered that payments were being made by the foreign subsidiary to government employees, or to third parties believed to be acting as intermediaries for government employees, for the purpose of securing government business. (Petitioner Exhibit 3, Tr. 78-79). The petitioner has referred to these payments as bribes or kickbacks paid directly or indirectly to foreign government employees to influence their action. Mr. Thomas in his testimony described them as "payments made by or on behalf of the Company or its subsidiaries, which were made to third parties or to Government employees under circumstances indicating that they might be for improper purposes." (Tr. 59-60). They will be referred to hereafter as the "questionable payments." From 1971 through 1975 these payments were in excess of four million

dollars. (Petitioner Exhibit 4). The fact of such payments was apparently known by certain inside directors and officers associated with the international operations of the Company. (Petitioner Exhibit 3).

The discovery of the questionable payments was reported by the auditors to Mr. Thomas and other individuals in the Company in January 1976. (Tr. 79) Mr. Thomas consulted with the Chairman of the Board and outside counsel and thereafter conducted a factual investigation to determine the nature and extent of the questionable payments and to be in a position to give legal advice to the Company with respect to the payments. (Tr. 60-61, 79). As a part of the investigation, Mr. Thomas and outside counsel prepared a written questionnaire to be mailed by the Chairman of the Board to 53 foreign general and area managers of the Company. The questionnaire elicited information regarding questionable payments and directed the addressee to return the form to Mr. Thomas. (Tr. 66, Respondents' Exhibits 2 and 3.)

In addition, Mr. Thomas interviewed by telephone or in person all persons to whom a questionnaire had been sent. He and two outside counsel also interviewed other persons who had not been mailed questionnaires. A total of 86 persons were interviewed, some of whom were no longer employees of the Company. (Tr. 64-66, 95-97, Respondents' Exhibit 1). The interviewer made written notes of the interviews. Mr. Thomas described his notes of the interviews as follows:

> "My notes would contain what I considered to be the important questions, the substance of the responses to them, my beliefs as to the importance of these, my beliefs as to how they related to the inquiry, my thoughts as to how they related to other questions. In some instances they might even suggest other questions that I would have to ask or things that I needed to find elsewhere. They were more than just a ver-

batim report of my conversation with the—a report of my conversation in the interviews." (Tr. 65)

The responses to the questionnaires and the notes of the interviews have been treated as confidential material and have not been disclosed to anyone except Mr. Thomas and outside counsel. (Tr. 65-66, 69-70)

Following Mr. Thomas' initial investigation of the questionable payments, the Company, on March 26, 1976, made a preliminary report of such payments to the Securities and Exchange Commission (SEC) on its Form 8-K. This report disclosed, based on Mr. Thomas' questionnaires and interviews, that the Company since January 1, 1971 had made questionable payments totalling $2,710,000 in 22 of the 136 countries served by the Company. The report to the SEC stated that the Company's investigation was still in progress and that further investigation would be furnished when the investigation was concluded. At the time the report was filed Mr. Thomas was aware that other companies were making similar disclosures and that the SEC had indicated a policy of more lenient treatment of corporations which voluntarily disclosed the type of payments here involved. (Petitioner Exhibit 3, Tr. 81-84). At the time of the disclosure to the SEC, the Company agreed to furnish the SEC with any additional data it might request with respect to the questionable payments. (Tr. 103-104)

On July 26, 1976, the Company filed with the SEC an amendment to its Form 8-K, in which it reported that responses, oral or written, had been received to all questionnaires, that additional interviews had been conducted, and that the total of questionable payments was in excess of four million dollars. (Petitioner Exhibit 4, Tr. 84)

Contemporaneously with the filing of the SEC Form 8-K in March 1976 and the amendment of Form 8-K in July 1976, the Company sent copies of those forms to the Internal Revenue Service. (Tr. 69, 84).

Prior to the filing of the 8-K report with the SEC in March 1976, the IRS had been conducting an audit of the Company's 1972 and 1973 consolidated federal income tax returns. That audit had almost been concluded when the IRS received a copy of the SEC 8-K report (Petitioner Exhibit 1). As a result the audit was not closed. The matter was referred to the Revenue Service's Intelligence Division, which, in a joint investigation with Revenue Agents, undertook an investigation for the years 1972, 1973, and 1974. (Tr. 29, 36-38)

The Company has furnished two schedules to IRS regarding the questionable payments. One schedule is entitled "Summary of Company Payments By Year (Companies Listed Are Those Companies with U. S. Tax Implications Only)." The schedule purports to list the date, the amount the company making the payment, and the country in which the payment was made from 1971 to early 1976. The Company listed on this schedule only those payments which it believed had an effect on its consolidated federal income tax returns. The payments shown total approximately $700,000. (Tr. 29-33)

The second schedule is less detailed and purports to be a county-by-country summary of payments made in connection with the Company's foreign operations which the Company claims do not affect its consolidated federal income tax returns. These payments total approximately $3,700,000. (Tr. 33-34).[2] The Company also furnished IRS with source documentation underlying the schedules, such as cancelled checks, vouchers, invoices, advices, etc., but the IRS claims it has not been furnished with sufficient data to enable it to determine whether there are more

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[2] The schedules were not introduced as exhibits but copies were furnished to me for my *in camera* inspection. It is not clear from the record whether these are the same schedules which the Company furnished to IRS, but for present purposes I am assuming that they are the same.

questionable payments than those shown in the schedules and whether the persons shown as ultimate recipients are in fact such. (Tr. 19-21, 33-35)

The Company has no objection to interviews and has permitted interviews by the IRS of Company employees involved in making questionable payments, but will not permit questions as to transactions which the Company has determined do not affect its consolidated federal income tax returns. (Tr. 46-48, 66-67). The Company has not agreed to bring any of its employees in foreign countries to the United States for interviews. (Tr. 104-105)

The Attorney—Client Privilege

The respondents claim that disclosure of the summoned material is shielded from disclosure by the attorney-client privilege. An oft-quoted definition is the one set forth in *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357 (D. Mass. 1950):

> "The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceedings, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client." *Id.* at 358.

Professor Wigmore defines it as follows:

> "(1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as

such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived." 8 Wigmore, Evidence § 2292 (McNaughton rev. 1961).

There is no question that the attorney-client privilege extends to corporations, *Radiant Burners, Inc. v. American Gas Association,* 320 F.2d 314 (7th Cir. 1963), and thus may be invoked by the Company here. Nor is there any question that "house counsel," such as Mr. Thomas when acting as a legal advisor to the Company, is within the purview of the attorney-client privilege under the same circumstances as "outside counsel." *Natta v. Hogan,* 392 F. 2d 686 (10th Cir. 1968).

As with all privileges, the person claiming the privilege has the burden of establishing all its essential elements. *In re Horowitz,* 482 F.2d 72 (2nd Cir. 1973), cert. den. 414 U.S. 867 (1973). The Sixth Circuit has observed that the privilege is designed to enable a client to confide in his attorney, secure in the assurance that there will be no disclosure, but that the privilege does not envelope everything arising from the existence of an attorney-client relationship. *United States v. Goldfarb,* 328 F.2d 280, 282 (6th Cir. 1964):

> "It is to be remembered that the attorney-client privilege is an exception carved from the rule requiring full disclosure, and as an exception should not be extended to accomplish more than its purpose. As Dean Wigmore said in his oft-quoted statement: 'It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.' 8 Wigmore, Evidence § 2291, at 554 (Mc-

> Naughton rev. 1961). The judicial decisions have echoed this need for a restrictive interpretation and application of the privilege. Prichard v. United States, 181 F.2d 326 (C.A. 6); United States v. United Shoe Machinery Corp., 89 F. Supp. 357 (D. Mass.) *Id.* at 282.

The privilege is at best a difficult one to apply. It becomes even more difficult when, as here, the client is a corporation. This stems from the fact that a corporation, being an artificial legal entity, can only act through its agents or employees. Since the attorney-client privilege applies only to communications by or to a "client," and since a corporation can communicate only through its employees or agents, the question arises as to the circumstances under which a communication of an employee or agent of the corporation may be deemed to be the communication of the corporate client enabling the corporation to claim the attorney-client privilege.

The landmark case of *Hickman v. Taylor,* 329 U.S. 495 (1947) dealt inferentially with this problem in the context of a partnership. The Court concluded that no attorney-client privilege could be claimed in that case by the defendant partnership for statements taken by the defendant's attorney from the crew members of the defendant's vessel, which was involved in an accident. The Court treated the employee crew members simply as witnesses and outside the scope of the privilege.

The problem was probably first met squarely and discussed in depth in *Philadelphia v. Westinghouse Electric Corp.,* 210 F. Supp. 483 (E.D. Pa. 1962), which involved the defendant's claim of privilege with respect to information acquired by its general counsel from an employee in the course of the counsel's investigation of facts relating to a pending indictment of the defendant. The court adopted the so-called "control group" test for determining whether the communication of a corporate employee or agent could

qualify as being the communication of the corporate client for the purpose of a corporation's invoking the attorney-client privilege. The court stated:

> "Now, in cases where an employee of a corporation in an executive or managerial position communicates a fact relative to pending litigation to a lawyer retained or employed by the corporation, the question frequently arises: When he does so, is the corporation seeking the advice of the attorney? In other words, was he at the time, in contemplation of law, the corporation seeking advice? If not, then he was giving the lawyer information in order that the latter could advise a client other than himself. In such case the employee is merely a witness and I think that Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451, settles the question that a statement given by a witness to a lawyer who is collecting information in order to prepare for litigation pending against the lawyer's client is not privileged although it may be within the ambit of the 'work product' principle; and it is very important to keep in mind the fact that the work product principle is not and cannot properly be described as a privilege. Some Courts have confused the situation by calling it a qualified privilege, but it is not a privilege at all; it is merely a requirement that very good cause be shown if the disclosure is made in the course of a lawyer's preparation of a case." *Id.* at 485.

The court also stated that the rank in the corporation of the employee making the communication is not a satisfactory guide in determining whether the privilege is applicable because such terms as manager, executive, or officer are not clearly defined terms. *Id.* at 485. The court stated the proper approach as follows:

> "Keeping in mind that the question is, Is it the corporation which is seeking the lawyer's advice when the

asserted privileged communication is made?, the most satisfactory solution, I think, is that if the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply. In all other cases the employee would be merely giving information to the lawyer to enable the latter to advise those in the corporation having the authority to act or refrain from acting on the advice." *Id.* at 485

The court went on to conclude that the communications made by the employee were not within the attorney-client privilege, stating:

"It is obvious that the matter as to which the witnesses in this case made the disclosures was a matter of overwhelming importance to the corporation, and that even a department or division head or an employee on a similar managerial level would hardly be given any substantial role in making that decision. It was a matter which, of course, the corporation knew made it probable that very heavy claims for damages would be asserted against it and a decision of that kind could have been made only by the very highest authority." *Id.* at 485-6.

In essence the court held that if the employee making the communication, of whatever rank he might be, was in a position to control or even to take a substantial part in a decision about any action which the corporation might take upon the resulting advice of the attorney, or if he was an authorized member of a body or group which had that authority, then in effect he was or personified the corpora-

tion when making the disclosure, and the privilege would apply, while in all other cases the employee would be merely giving information to the lawyer to enable the latter to advise those in the corporation having the authority to act or refrain from acting on the advice.

The control group test has been followed in many decisions. See, for example, *Natta v. Hogan,* 392 F.2d 686 (10th Cir. 1968); *Virginia Electric & Power Co. v. Sun Shipbuilding & Dry Dock Co.,* 68 F.R.D. 397 (E.D. Va. 1975); *United States v. International Business Machines Corp.,* 66 F.R.D. 154, 178 (S.D.N.Y. 1974); *Burlington Industries v. Exxon Corporation,* 65 F.R.D. 26 (D. Md. 1974); *Honeywell Inc.* v. *Piper Aircraft Corp.,* 50 F.R.D. 117 (M.D. Pa. 1970); *Congoleum Industries Inc. v. G.A.F. Corp.,* 49 F.R.D. 82 (E.D. Pa. 1969); *Garrison v General Motors Corp.,* 213 F. Supp. 515 (S.D. Cal. 1963).

I am aware of *Harper & Row Publishers, Inc. v. Decker,* 423 F.2d 487 (7th Cir. 1970), affirmed *per curiam* by an equally divided court, 400 U.S. 348 (1971), reh. den., 401 U.S. 950 (1971), cited in respondents' brief, which held that the control group test is not wholly adequate. The court held that an employee of a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment. It would appear that the *Harper & Row* formula would exclude virtually nothing from its sweep and flies in the face of the well-established principle that the privilege "should be strictly confined with the narrowest possible limits consistent with the logic of its principle." *United States v. Goldfarb,* supra.

It would also appear to open the door to the danger envisioned by the Supreme Court in *Hickman v. Taylor*, supra:

> "Thus in a suit by an injured employee against a railroad or in a suit by an insured person against an insurance company the corporate defendant could pull a dark veil of secrecy over all the pertinent facts it can collect after the claim arises merely on the assertion that such facts were gathered by its large staff of attorneys and claim agents." 329 U.S. at 506.

In view of the overwhelming acceptance of the control group test, I have concluded that it should be followed in this case.[3] Thus the fact that the persons interviewed by Mr. Thomas were branch managers or area managers is not determinative of whether the privilege is applicable. The important question is whether they were in a position to control or to take a substantial part in a decision about any action the Company might take upon the advice of Mr. Thomas, or whether they were merely giving information to Mr. Thomas to enable him to advise those in the corporation having the authority to act or refrain from acting on his advice. It is apparent from the record that the matter as to which the interviewees made the disclosures to Mr. Thomas was a matter of overwhelming importance to the Company but not one as to which any of the interviewees would be given any substantial role. When Mr. Thomas first heard of the questionable payments, he went first to

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[3] It is speculative as to how much, if any, of the information Mr. Thomas obtained from the Company employees would be protected even under the *Harper & Row* formula, since it requires that the employees' communications deal with subject matter within the duties of their employment. Mr. Thomas testified that the person interviewed may himself have been a participant in the payments or he may have been reporting on what he had learned, through investigation, about the activities of others. (Tr. 93-94)

the Chairman of the Board to discuss the matter. The questionnaire that was sent to the employees went out over the signature of the Chairman of the Board. Mr. Thomas' concern was with the SEC ramifications, the tax consequences, currency regulations, and the like. (Tr. 79-80). These are matters on the highest corporate level and hardly within the domain or authority of the persons interviewed. Clearly, these persons in completing the questionnaires and submitting to interviews were simply giving information to Mr. Thomas to enable him to advise the Board of Directors and its Chairman as to how to handle the securities, tax, and related problems which the questionable payments created. Only the latter had the authority to act in these areas. Thus the disclosures made by the interviewees to Mr. Thomas or the Company's outside counsel do not fall within the attorney-client privilege.

It may also be noted that the attorney-client privilege may be lost or waived by disclosing to others what has earlier been confided to an attorney. See *United States v. Cote,* 456 F. 2d 142 (8th Cir. 1972) (filing of amended tax returns which reflected accountant's workpapers to which privilege had attached effectively waived the privilege not only as to the transmitted data but also as to the details underlying that information); *United States v. Schoeberlein,* 335 F. Supp. 1048 (D. Md. 1971). (Work papers of accountant-attorney were no longer privileged after being used as a basis for a Federal Communication Commission license application as well as for a tax return); *B & C Trucking Co. v. Holmes & Narver, Inc.,* 39 F.R.D. 317 (D. Haw. 1966). (Disclosure of internal communications between contractor and its attorney to Atomic Energy Commission destroyed or waived any attorney-client privilege.) The doctrine of waiver was referred to in *Duplan Corporation v. Deering Milliken, Inc.,* 397 F. Supp. 1146 (D. S.C. 1975) as follows:

"A waiver of the privilege as to all communications ordinarily follows from the voluntary waiver even if made *with limitations* of one or more similar communications. Thus, if a client, through his attorney, voluntarily waives certain communications, but guarded with a specific written or oral assertion at the time of the waiver that it is not its intention to waive the privilege as to the remainder of all similar communications, the privilege, as to the remaining undisclosed communications, is nevertheless waived.

"Plaintiff's argument that waiver requires an intentional relinquishment or abandonment of a known right has a familiar ring with regard to general contract law, but waiver, as applied to the particular subject of attorney-client privilege, may be made by implication:

> "A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that *his privilege shall cease whether he intended that result or not.* 8 Wigmore, Evidence § 2327 (McNaughton rev. 1961." *Id.* at 1162 (Emphasis in original)

In the present case, the Company made disclosures to the SEC with respect to the questionable payments in its 8-K report of March 26, 1976, and its amended 8-K report of July 26, 1976. Furthermore, the Company agreed to furnish the SEC with any additional data it might request with respect to such payments. (Tr. 103-104) Copies of the SEC reports and related data was also furnished to the IRS. Having disclosed some data with respect to questionable payments, it now seeks to hold back other data relating to the same matter. Under the circumstances, the

Company should be deemed to have waived the attorney-client privilege with respect to the same matter, if indeed it ever existed. As stated by the court in *Burlington Industries v. Exxon Corporation*, supra:

> "Nevertheless, the court is not unmindful of the fact that privileges cannot be used as both a sword and a shield. A party cannot choose to disclose only so much of allegedly privileged matter as is helpful to his case. 8 Wigmore, Evidence § 2327 (McNaughton Rev. 1961). Once the party begins to disclose any confidential communication for a purpose outside the scope of the privilege, the privilege is lost for all communications relating to the same matter." 65 F.R.D. at 46,

Mindful of the admonition requiring "a restrictive interpretation and application of the privilege," *United States v. Goldfarb*, supra, I find that the respondents have not sustained their burden of proving that the summoned material is shielded from disclosure by the attorney-client privilege, and that the privilege is not applicable here.

The Work Product Doctrine

The respondents claim that disclosure of the summoned material is also shielded from disclosure by the work product doctrine. This doctrine had its genesis in *Hickman v. Taylor*, 329 U.S. 495 (1947). The Court there held that while private memoranda, written statements of witnesses, and mental impressions or personal recollections prepared or formed by an attorney in the course of his legal duties for his own use in prosecuting his client's case and contained in his files or mind fall outside the scope of the attorney-client privilege, and hence are neither protected from discovery on that basis nor protected from disclosure because the subject matter is "privileged" or "irrelevant" as those concepts are used in the federal rules, nevertheless they are protected from discovery as the "work product"

of the attorney, in the absence of any showing of necessity or any indication or claim that denial of discovery would unduly prejudice the preparation of the inquiring party's case or cause him any hardship or injustice.

The respondents argue that counsel's notes of the interviews constitute material squarely covered by the attorney work product doctrine, and that so do the responses to the questionnaires because the information thus obtained is the product of the work of the Company's counsel.[4]

There is, at the outset, a serious question as to whether the work product doctrine is even applicable in a summons enforcement proceeding. In *United States v. McKay*, 372 F.2d 174 (5th Cir. 1967), which also involved the enforcement of an Internal Revenue Service summons under 26 USC § 7604(a), the court held that the relevancy of the work product rule to such a proceeding "may well be doubted." The court stated:

> "We think the power of the Commissioner of Internal Revenue to investigate the records and affairs of taxpayers is greater than that of a party in civil litigation. His power has been characterized by this court as an inquisitorial power, analogous to that of the grand jury and one which should be liberally construed. Falsone v. United States, 5 Cir. 1953, 205 F.2d 734, 742 cert. den. 346 U.S. 864, 74 S. Ct. 103, 98 L. Ed. 375. In such context, the criteria of relevancy and materiality have broader connotations than in the context of trial evidence. Schwimmer v. United States, 8 Cir.

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[4] To the extent that the responses to the questionnaires simply reflect the answers of the employee, they would appear to be no different than the written statement of a witness which records the mental impressions and observations of the witness, rather than those of the attorney. In such case, the response would not properly be considered the work product of the attorney. See *Scourtes v. Fred W. Albrecht Grocery Co.*, 15 F.R.D. 55, 58 (N.D. Ohio 1953).

1956, 232 F.2d 855, 862, cert. den. 352 U.S. 833, 77 S. Ct. 48, 1 L. Ed. 2d 52. As was said in Bolich v. Rubel, 2 Cir. 1933, 67 F. 2d 894, 895, these inquisitorial powers are justified 'because all the facts are in the taxpayer's hands.' Accordingly, the relevancy of the work product privilege enunciated in the *Hickman* case to a proceeding for the enforcement of the Commissioner's summons may well be doubted." *Id.* at 176.

However, even if the work product doctrine is deemed applicable to this type of proceeding, the doctrine is not a privilege, and discovery may still be had upon a showing of "substantial need" and an inability "without undue hardship" to obtain the information by other means. Rule 26(b)(3), Federal Rules of Civil Procedure. *Hickman v. Taylor,* supra, 329 U.S. at 511; *Burlington Industries v. Exxon Corporation,* supra, 65 F.R.D. at 43. Thus in *United States v. Brown,* 478 F.2d 1038 (7th Cir. 1973), the court, although holding that the work product doctrine does have applicability to a proceeding for the enforcement of an Internal Revenue Service summons, nevertheless concluded that a three-page memorandum prepared by an attorney summarizing notes and legal judgments made by the attorney at a meeting involving a discussion of the tax consequences of a client's potential business transaction was not protected from discovery by the attorney's work product doctrine.

The court stated:

"The Supreme Court has also noted the strong Congressional evidence of intent that the Commissioner of Internal Revenue not be impeded in his investigation of taxpayers:

'Section 7601 of the 1954 Code, 26 U.S.C. § 7601, directs the Secretary or his delegate "to the extent he deems it practicable" to cause Treasury Department officers or employees "to proceed . . . .

> and inquire after and concerning" all persons "who may be liable to pay any internal revenue tax." The section thus flatly imposes upon the Secretary the duty to canvass and to inquire.' Donaldson v. United States, 400 U.S. 517, 523, 91 S.Ct. 534, 539, 27 L.Ed.2d 580 (1971).
>
> "We think the work product doctrine does have applicability to a proceeding for the enforcement of an Internal Revenue summons. *The strong public interest as expressed by Congress in enforcement of the Internal Revenue Act may, however, be relevant in considering the degree of necessity which need be shown prior to the enforcement of an order to produce.*" Id. at 1040-41 (Emphasis supplied.)

In the present case, respondents claim that no necessity exists for allowing disclosure of the responses to the questionnaires or to counsel's notes of the interviews because the respondents have already disclosed ample information both to the IRS and SEC, and because the IRS has already interviewed many of the Company employees. However, the fact is that the Company has refused to allow any of its employees to be interviewed as to any transactions which it has determined for itself have no impact on the Company's federal tax return. Nor has it been willing to disclose details of any transactions for which it has reached the same conclusion. (Tr. 46-48, 66-67). Thus, the Company has relegated to itself the determination of what is or is not relevant to the investigation of the Revenue Service. The record demonstrates that the Company has made questionable payments in excess of four million dollars. It concedes that approximately $700,000 of those payments affect its consolidated federal tax return. As to the balance of payments, the Company insists that the Revenue Service must accept the Company's conclusion that those payments have no effect on its tax return. (Tr. 33-35) Special Agent Novak testified that instead of accepting the summary of

the Company's investigation at face value, he wished to obtain additional information, such as verification of the recipients of the payments, and to check whether there may have been payments which were not recorded on the Company's books. (Tr. 14, 51-52) Moreover, it is not inconceivable that a payment which the Company claims has no impact on its domestic tax return may upon investigation disclose the contrary.

The necessity for compelling disclosure in this case is also indicated by the fact that the persons interviewed are beyond the jurisdiction of the court and thus not subject to compulsory process. Even if they were made available for interviews,[5] it is not unreasonable to expect some hesitancy, if not actual hostility, in answering questions with respect to payments which might have been made in violation of local laws. Moreover, where interviews have in fact been permitted, the scope of the inquiry has been limited to what the Company's counsel deemed appropriate. (Tr. 46-48) In *Hickman* v. *Taylor,* supra, the Court stated that "production [of work product] might be justified where the witnesses are no longer available or can be reached only with difficulty." 329 U.S. at 511. Similarly, in *Burlington Industries v. Exxon Corporation,* supra, the court stated that the factors to be considered in deciding whether to compel disclosure are "(1) the importance of the information sought and (2) the difficulty the party seeking discovery will face in obtaining substantially equivalent information from other sources if discovery is denied." 65 F.R.D. at 43.

Cf. *Southern Railway Company v. Lanham,* 403 F.2d 119, 128 (5th Cir. 1969), reh. den. 408 F.2d 348 (1969) (employees who may be expected to be somewhat reluctant to answer fully questions which might have an adverse

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[5] Although the Company has said it will make its employees available for interviews, it has not agreed to bring them to the United States for this purpose. (Tr. 104-105)

effect on their employer); *McDonald v. Prowdley,* 38 F.D.R. 1 (W.D. Mich. 1965) (unavailability of witness or difficulty of access to a witness); *Wilson* v. *David,* 21 F.R.D. 217, 221-2 (W. D. Mich. 1957) (witness residing outside the jurisdiction of the court).[6]

I find that the record establishes ample necessity for compelling disclosure of the summoned material in this case, and that the work product doctrine does not shield the material from such disclosure.

The Standards of Enforcement of the Summons

The respondents claim that the standards necessary for judicial enforcement of an Internal Revenue summons as set forth in *United States v. Powell,* 379 U.S. 48 (1964) were not complied with. In *Powell,* the court stated:

> "He [the Commissioner] must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed. . . ." *Id.* at 57.

The Court also held that the burden of showing an abuse of the court's process is on the taxpayer. *Id.* at 58.

The respondents do not claim that the administrative steps required by the Code have not been followed. They do claim, however, that the first three requirements enumerated in the quotation from *Powell* have not been satisfied.

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[6] These cases involved the disclosure of statements of employees under Rule 34 of the Federal Rules of Civil Procedure upon a showing of "good cause."

The claim that the summons was not issued for a legitimate purpose is clearly without merit. Respondents assert that the summons was issued solely for the purpose of a criminal prosecution, but this assertion is not substantiated by the record. On the contrary, the record establishes that no recommendation for prosecution had been made to the Department of Justice. It also established that the investigation was primarily a civil one and that no determination had been made as to whether the Company or anyone else should be prosecuted, although the possibility of criminal violation is always inherent in any such investigation. (Tr. 14-16, 37-38) In this connection, the Supreme Court in *Donaldson v. United States*, 400 U.S. 517 (1971) stated:

> "Congress clearly has authorized the use of the summons in investigating what may prove to be criminal conduct. The regulations are positive. Treas. Regs. § 301.7602-1(c)(4), 26 CFR § 301.7602-1(c)(4). The underlying statutes are just as authoritative. Section 6659(a)(2) of the Code defines the term 'tax' as used in the Code and, hence, in the authorizing § 7602, to include any addition or penalty. Section 7602 contains no restriction; further, it has its ascertainable roots in the 1939 Code's § 3614 and, also, § 3615(a)-(c), which, by its very language and by its proximity to § 3616 and § 3654, appears to authorize the use of the summons for investigation into criminal conduct. There is no statutory suggestion for any meaningful line of distinction, for civil as compared with criminal purposes, at the point of a special agent's appearance. See *Mathis v. United States*, 391 U.S. 1, 4 (1968). To draw a line where a special agent appears would require the Service, in a situation of suspected but undetermined fraud, to forgo either the use of the summons or the potentiality of an ultimate recommendation for prosecution. We refuse to draw that line and thus to stultify enforcement of federal law. See *United States v. Kordel*, 397 U.S. 1, 11 (1970).

> "We hold that under § 7602 an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution. *Id.* at 535-6.

Nor do I find anything in the record to justify the assertion that the summons was not issued in good faith. At most, the summons might be classified as having a dual purpose, which clearly would not render it improper. In *United States v. Held,* 435 F.2d 1361 (6th Cir. 1970), the court stated:

> "Even if the primary purpose of the summons was to further the criminal tax investigation, we believe the secondary purpose of determining appellant's civil tax liability would support the validity of the summons. . . ."
>
> "It is well settled that a § 7602 summons issued for an authorized purpose is entitled to enforcement even though it may produce evidence of criminal conduct on the part of the taxpayer. (Citations omitted)
> "Enforcement of the summons is not precluded by the possibility that it eventually might lead to a criminal prosecution." *Id.* at 1364-5.

See also *United States v. Haddad,* 527 F.2d 537 (6th Cir. 1975); *United States v. Weingarden,* 473 F.2d 454 (6th Cir. 1973).

Nor is there merit in the respondents' claim that the inquiry is not relevant to its purpose. In this connection, Special Agent Nowak testified:

> "Q. Why do you feel that you should have these documents, if I may add, rather than take the Upjohn Company's assurance as to what the relevance of those documents?

"A. Well, I feel that those files may contain evidence that would indicate that there is in fact a tax implication involved in payments which the Company has alleged have no U.S. tax implication. These files may provide leads or other evidence that would have a relationship to those payments that the Company does admit have a U.S. tax implication.

"I believe that it would—if it served no other purpose, it would help me corroborate the Company's position that there is no tax impact, if that is what the facts would show upon my investigation of the files.

"Q. So while it may be a conclusion that the Court has to draw, in your view the summoned documents were, at the time summoned and are today, necessary to your continuing investigation, is that correct.

"A. Yes, sir." (Tr. 14)

Respondents in their brief point to the fact that Agent Nowak used the word "may" in explaining what he was seeking, that is, evidence that "may" indicate tax implications or "may" provide leads to such evidence. It is noted that this is no less than the applicable statute, 26 USC § 7602, requires. The statute authorizes the Secretary to "examine any books, papers, records, or other data which *may* be relevant or material to such inquiry."

The Supreme Court has recognized the strong Congressional intent that the Revenue Service not be hindered in its investigation of taxpayers, and that the applicable statute "flatly imposes upon the Secretary the duty to canvass and to inquire." *Donaldson v. United States,* supra, 400 U.S. at 523. The test of relevancy was stated in *Foster v. United States,* 265 F.2d 183 (2nd Cir. 1959), cert. den. 360 U.S. 912 (1959), as follows:

"The test, we think, is essentially the same as that for materiality with respect to grand jury investigations.

(Citations omitted) It is whether the inspection sought 'might have thrown light upon' the correctness of the taxpayer's returns."

See also *United States v. Egenberg,* 443 F.2d 512, 515 (3rd Cir. 1971); *United States v. Harrington,* 388 F.2d 520, 523 (2nd Cir. 1968); *United States v. Auker* 325 F. Supp. 857 (S.D. N.Y. 1971).

In *United States v. Auker,* supra, the summons sought the production of the taxpayer's corporate minutes for several taxable years. The taxpayer (Standard Oil Company of New Jersey) argued that since not everything in the corporate minutes was relevant, it was not required to disclose all of its minutes. Therefore, it decided it "would make available for inspection all minutes which might have a bearing on the determination of Jersey's income tax liability." Thus, the taxpayer, like the Company here, undertook to decide for itself what was relevant, or more particularly what would affect or have a bearing on its tax liability. In rejecting this position, the court stated:

"The accountants, to be sure they see what is germane to their task, look at minutes that turn out not to be germane. They do not accept the views of others as to what they ought to examine, and the company does not expect them to do so. This makes sense for them. It makes equally good sense, *mutatis mutandis,* for the agents of the IRS.

"When we turn to the governing precedents, we discover what is not altogether extraordinary—that the dictates of good sense are in line with the law's commands. The cases show that the statutory provision for the examination of papers that '*may* be relevant or material'—properly viewed as a prediction about things yet unseen, not as a judgment about materials presented or offered for 'rulings'—has to mean what it quite simply says: that the demand may extend to

documents that 'might' throw light upon subjects under legitimate inquiry. . . . The agents of the IRS cannot and they need not guarantee that everything they wish to see *will* be relevant or material to their inquiries any more than Jersey's accountants can do for theirs." 325 F.Supp. at 861-2.

Respondents also complain of the fact that the summons shows on its face that it relates to the tax liability of the Company for the years 1972, 1973, and 1974; yet the summons seeks information regarding questionable payments "since January 1, 1971." Special Agent Nowak explained the reason for the time span as follows:

"Q. Mr. Nowak, you have been sworn, of course. Some comment has been made about the years '71 and '75 with respect to this Summons. Would you briefly explain the relevance and necessity for those documents and the other information sought with respect to your investigation, which is currently for '72 through '74?

"A. Well, in relation to 1975, the fact that there has been a Schedule M adjustment indicates that there is an item that the Internal Revenue Service ought to check to make sure the adjustment has been treated properly. And, in addition, the Government's position, the Internal Revenue Service's position has always been clearly stated that while the investigation covered the years 1972 through 1974 we were not precluded in opening up going into the 1975 were we to find indications of possible criminal or civil ramifications in these payments. And in regard—we could also have the option of going back to 1971, if we wanted to. Another possible relevancy for that material, especially 1971, is the possibility of transactions occurring in one year and not being recorded on the books and records of the Company in that year, but for various reasons, through error or otherwise being recorded in another

year, so we would have to make sure that transactions were properly reflected in the year that they occurred." (Tr. 51-52)

The limited disclosures which the Company voluntarily made to the SEC and the IRS covered the period "since January 1, 1971." Under the circumstances, it was reasonable for the Revenue Service to request information for a period at least as long as that covered by the Company's disclosures.

Respondents also point to the fact that on November 28, 1977, the Internal Revenue Service issued a Revenue Ruling which, they claim, holds that illegal bribes and kickbacks made by a foreign subsidiary properly reduce the earnings and profits of that subsidiary, and, in effect, do not have an impact on the United States tax return of the parent. Rev. Rul. 77-442, 1977-48 I.R.B. 10. This, of course, does not answer the basic question, whether the respondents can unilaterally decide for themselves whether the questionable payments fall within the ambit of the ruling. Moreover, the Company's own tax expert, David S. Creamer, who is the Manager of the Company's Corporate Tax Planning Unit, candidly conceded that there are various situations in which the arrangements between a domestic parent and a controlled foreign corporation could have an impact on the parent's federal income tax return. (Tr. 141-143)[7] The Revenue Service should be able to determine for itself whether any of the questionable payments were made under circumstances or arrangements which would trigger tax consequences.

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[7] One example cited was where a controlled foreign company creates an off-book account, not shown on its records, from which it disburses funds in the foreign country for the benefit of the American parent. This, the witness testified, would have an impact on the domestic tax return of the parent as a constructive dividend. (Tr. 141)

The respondents also claim that the summons should not be enforced because the "information sought is . . . . . already within the Commissioner's possession." *United States v. Powell*, supra, 379 U.S. at 57. Respondents misconstrue the quoted words, which obviously refer to the data sought by the summons itself. Clearly, respondents' failure to provide the data specified in the summons is the reason this enforcement proceeding was instituted. The information which is "already within the Commissioner's possession" is simply that which the respondents have unilaterally chosen to reveal to him. As set forth above, the Commissioner desires additional information, and he is not bound to accept the respondents' determination of relevancy at face value.

Finally, respondents claim in their brief that the summons here constitutes nothing more than a "fishing expedition." If this be so, this claim was fully answered in *United States v. Giardano*, 419 F.2d 564, 568 (8th Cir. 1970):

> "Taxpayer in his brief characterized the Government's efforts as a 'fishing expedition.' If so, the Secretary or his delegate has been specifically licensed to fish by § 7602."

For the reasons herein stated, I find that the summoned material is not shielded from disclosure by the attorney-client privilege, nor by the work product doctrine, and that the standards required for judicial enforcement of the summons have been met. Therefore, I respectfully recommend that an order be entered compelling the respondents to comply with its terms.

/s/ Stephen W. Karr
Stephen W. Karr,
United States Magistrate

Dated: February 23, 1978

[Filed: March 23, 1978]

UNITED STATES MAGISTRATE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
666 FEDERAL BUILDING
GRAND RAPIDS, MICHIGAN 49502

March 7, 1978

STEPHPN W. KARR
MAGISTRATE

The Honorable Noel P. Fox
Chief Judge
411 Federal Building
Grand Rapids, Michigan 49503

Re: United States v. Upjohn Company, et al.
No. K77-7 Misc. CA 4

Dear Judge Fox:

I submitted my Report and Recommendation in the above-captioned matter on February 23, 1978.

The February 28, 1978 issue of United States Law Week, which arrived here on March 3, reports on a recent decision of the Eighth Circuit dealing with the attorney-client privilege in a factual situation somewhat similar to the Upjohn case. The case is *Diversified Industries, Inc. v. Meredith*, 46 L.W. 2435, apparently decided on February 15, 1978. A copy of the Law Week report of the decision is attached.

The Eighth Circuit opinion was brought to my attention by Mr. Wallson Knack, who is Upjohn's local counsel in this matter. He telephoned me and asked whether I thought a motion for reconsideration would be appropriate in view of that opinion. I had not seen the opinion, and suggested that it might expedite a final decision in this case if he would simply bring the opinion to the court's attention when filing his objections to my Report and Recommenda-

tion, rather than filing a motion for reconsideration before me.

I have now read the Law Week report of the Eighth Circuit decision, and, on second thought, I believe it would be appropriate for me to give my views on the decision both to the court and to counsel. I am sending a copy of this letter to all counsel. On Mr. Knack's motion, I have heretofore extended the time for filing objections to my Report and Recommendation to March 10, 1978. I am hereby extending such time to March 17, 1978, in the event counsel believe this letter requires further comment on their part.

You will note that the Eighth Circuit opinion states that the Federal courts have developed two tests to deal with the problem of when a corporate employee's conversations with the corporation's attorney are protected by the attorney-client privilege. First is the "control group" test under which an employee statement is not considered a corporate communication unless the employee is in a position to control or to take a substantial part in a decision about any action that the corporation may take upon the advice of the attorney. Under the second test, the employee's communications are privileged where the employee makes the communication at the direction of a corporate superior and where the subject matter concerns the performance of the employee's duties.

I also referred to these tests in my Report and Recommendation (pages 9-11). After reviewing and analyzing the two tests, I concluded;

> "In view of the overwhelming acceptance of the control group test, I have concluded that it should be followed in this case." (Page 11)

The Eighth Circuit opinion states that both tests are subject to criticism and therefore adopts a third test. It holds that the attorney-client privilege is applicable to an

employee's communication if: (1) the communication is made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those who, because of the corporate structure, need to know its contents. The corporation, the court adds, has the burden of showing that the communication meets all of these requirements.

In my opinion, this new test, which purports to be a modification of the second test, has the same infirmities of the second test as pointed out in my Report and Recommendation (page 11):

> "[The second test] would exclude virtually nothing from its sweep and flies in the face of the well-established principle that the privilege 'should be strictly confined within the narrowest possible limits consistent with the logic of its principle.' *United States v. Goldfarb,* supra." [328 F.2d 280, 282 (6th Cir. 1964)

I also note that the Eighth Circuit opinion was not a unanimous one. The dissent noted that the investigation of the attorneys there involved was primarily a factual one that could have been performed just as readily by non-lawyers, aided to the extent necessary by a firm of public accountants. The dissent concluded that neither the investigation which involved the question of whether the corporation had engaged in certain illegal practices during proxy fight litigation, nor the making of the recommendations based thereon amounted to the performance of legal services or the giving of legal advice. The same could be said of the present case, which involved the question of

whether the corporation had engaged in certain illegal practices in soliciting business in foreign countries.

I note also that the Eighth Circuit test requires that the communication be not disseminated beyond those persons who, because of the corporate structure, need to know its contents. This would appear to incorporate the waiver doctrine, which I discussed in my Report and Recommendation (pages 12-14). As I stated there, Upjohn's disclosures to the SEC, as well as the IRS, and its agreement to furnish the SEC with any additional data it might request, should be deemed a waiver of the attorney-client privilege, if indeed it ever existed.

I adhere to the conclusions reached in my Report and Recommendation.

Very truly yours,

/s/ Stephen W. Karr
Stephen W. Karr
United States Magistrate

SWK:rl
cc: All Counsel

THE UNITED STATES LAW WEEK
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NEW COURT DECISIONS

Significant Opinions Not Yet Generally Reported

Attorneys

PRIVILEGE—

Law firm's confidential interviews with corporate employees who were instructed to cooperate with firm's investigation, requested by corporation, of possibly illegal corporate practices are protected by attorney-client privilege even though employees are not in position to control or take substantial part in decision about any action corporation may take based on law firm's advice.

During proxy fight litigation, facts surfaced indicating that the corporation may have engaged in certain illegal practices. As a result, the corporation's board of directors passed a resolution engaging the services of the law firm to conduct an investigation into the disclosures and to make a report to the board. Employees were instructed to cooperate fully with the firm's investigation. During the course of the investigation, the law firm interviewed several employees, including some who were not in a position to control or take a substantial part in any decision the corporation might make based on the law firm's advice. One law firm's report summarized these interviews, analyzed data, evaluated the conduct of certain employees, drew conclusions as to the propriety of their conduct, and made recommendations as to the steps the corporation should take. Now, in a lawsuit against the corporation, the plaintiff is seeking disclosure of the report; the corporation claims that the report is protected by the attorney-client privilege.

The court must determine the circumstances in which employee communications can be classified as the corporate client's communications. Two tests have developed. First is the "control group" test. In this test, an employee's statement is not considered a corporate communication unless the employee is in a position to control or even to take a substantial part in a decision about any action that the corporation may take upon the advice of the attorney. This is the most widely used test. The second test protects the communication if the employee, though not a member of its control group, is directed by a corporate superior to make the communication and the communication concerns the performance of the employee's duties.

The control group test has come under increasing criticism because it attempts to equate corporate clients with individual clients. Before an employee's communication will be deemed the corporate client's communication, the control group test demands that the employee communicate to the attorney and be in a position to control or play a substantial role in any decision based on the attorney's advice. In practice, this results in protecting only communications of top level executives and this fails to take into account the realities of corporate life. It may be necessary to glean information relevant to a legal problem from middle management and non-management personnel as well as from top executives. The control group test inhibits the free flow of information to a legal advisor in these circumstances and defeats the purpose of the attorney-client privilege. Thus, the court concludes that the control group test is inadequate for determining the extent of a corporation's attorney-client privilege.

The second test provides a more reasoned approach by focusing upon why an attorney was consulted rather than with whom the attorney communicated. But this test also has its critics since it can result in shielding data from the discovery process. Critics fear that many corporations will

attempt to funnel most corporate communications through their attorneys in order to prevent subsequent disclosure.

Judge Weinstein, in his text on evidence, suggests several modifications of this second test in order to substantially limit whatever potential for abuse the test presents.

[Text] We feel that the limitations suggested by Judge Weinstein have merit and that the attorney-client privilege is applicable to an employee's communication if (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents. We note, moreover, that the corporation has the burden of showing that the communication in issue meets all of the above requirements. [End Text]

The employee interviews conducted here are within the scope of the attorney-client privilege as it is defined by these standards. The communications were made for the purpose of securing legal advice. The law firm was given complete autonomy to conduct a professional investigation and inquiry, it was authorized to procure such assistance as reasonably required, and it was authorized to interview any employee who might have knowledge of the facts. Most importantly, it was given authority to analyze data, to evaluate and draw conclusions as to the propriety of past actions, and to make recommendations for possible future courses of action. The application of the attorney-client privilege to this matter and others like it will encourage corporations to seek out and correct wrong-doing in their own house and to do so with attorneys who are obligated to conduct the inquiry in an independent and ethical

manner. The remaining requirements of the Weinstein test have also been met. All corporate employees were specifically instructed to cooperate and the interviews explored only areas within the bounds of the employees' corporate duties. Finally, the corporation scrupulously avoided disseminating this information to other than those immediately concerned with the results.—Heaney, J.

Dissent. The majority's premise that the corporation employed the law firm as its attorney to give it legal advice cannot be accepted. The firm was employed to make a factual investigation and business recommendations in such areas as the results of the investigation might suggest. The firm did just that. The work it performed could have been performed just as readily by nonlawyers, aided to the extent necessary by a firm of public accountants. Thus, one of the primary requisites of a successful claim of attorney-client privilege never came into existence. Neither the investigation nor the making of the recommendations based thereon amounted to the performance of legal services or the giving of legal advice.—Henley, J.

Dissent. This controversy is moot and thus there is no reason to reach the merits. Although reluctant to express an opinion on the merits, I agree in the main with the dissenting views of Judge Henley.—Bright, J.

—CA 8 (en banc); Diversified Industries, Inc. v. Meredith, 2/15/78.

[Filed: March 23, 1978]

UNITED STATES MAGISTRATE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
666 FEDERAL BUILDING
GRAND RAPIDS, MICHIGAN 49502

March 13, 1978

STEPHEN W. KARR
MAGISTRATE

The Honorable Noel P. Fox
Chief Judge
411 Federal Building
Grand Rapids, Michigan 49503

Re: United States v. Upjohn Company, et al.
No. K77-7 Misc. CA 4

Dear Judge Fox:

I have received a copy of the Respondents' Motion for Reconsideration and Objection to Report and Recommendation of Magistrate, which was filed on March 8, 1978, and I have reviewed the supporting brief and the Eighth Circuit opinion in *Diversified Industries Inc. v. Meredith*, 46 L.W. 2435, which forms the basis of the motion.

I assume the Motion for Reconsideration is directed to me. To the extent that it is, I believe that my letter to you under date of March 7, 1978, a copy of which was sent to all counsel, is a sufficient disposition of that motion. In my letter, I discussed the *Meredith* opinion as reported in Law Week, and concluded that I should adhere to the conclusions reached in my original Report and Recommendation for the reasons expressed in my letter. I have now reviewed the full text of the *Meredith* opinion, including the three dissents, and I still see no reason to depart from my original conclusions. The only additional comment I would make is that, although the respondents'

brief appears to question my conclusion that there has been overwhelming acceptance of the "control group" test (Respondents' brief, page 5), the *Meredith* opinion confirms that it is the "most widely used test" and that it "predominates" (*Meredith,* slip opinion, page 6). This, of course, is not in itself a sufficient basis for choosing it over the "subject matter" test. As stated in *Meredith,* each test has its critics (slip opinion, pages 6, 8). *Meredith* purports to adopt a third test which it states to be a modification of the "subject matter" test. As I stated in my letter of March 7, 1978, I find in this new test the same basic infirmities of the "subject matter" test discussed in my Report and Recommendation, and which led me to reject it in favor of the "control group" test.

I adhere to the conclusions reached in my Report and Recommendation.

Very truly yours,

/s/ Stephen W. Karr
Stephen W. Karr
United States Magistrate

SWK:rl
cc: All Counsel

[Filed: April 28, 1978]

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

K77-7 Misc.

UNITED STATES OF AMERICA and DAVID E. NOWAK,
Special Agent, Internal Revenue Service,
Petitioners,

v.

UPJOHN COMPANY and GERARD THOMAS,
Vice President and Secretary,
Respondents.

ORDER

Magistrate Karr submitted to me his Report and Recommendation in the above matter on February 23, 1978. I promptly read the report and the briefs submitted by the parties and agreed with the Report and Recommendation.

The February 28, 1978 issue of U.S. Law Week, which arrived on March 3, 1978, reports on a recent decision of the Eighth Circuit Court of Appeals dealing with the attorney/client privilege in a factual situation somewhat similar to the Upjohn case. That case is *Diversified Industries Inc.* v. *Meredith,* 46 L.W. 2435, apparently decided on February 15, 1978. A copy of the decision was attached to a letter-amendment to the Magistrate's Report and Recommendation submitted on March 7, 1978.

I have carefully read and considered *Diversified Industries, Inc.* v. *Meredith,* supra, cited by Magistrate Karr in his letter-amendment of March 7, 1978, and his further letter-amendment of March 13, 1978. I find the Magistrate's Report and Recommendation is an excellent opinion

and is the prevailing law. Therefore, I hereby accept as the opinion of this court the Magistrate's Report and Recommendation.

IT IS SO ORDERED.

/s/ ILLEGIBLE
Chief Judge, U.S. District Court
Western District of Michigan

Dated: April 28, 1978.

ILLEGIBLE
ILLEGIBLE

/s/ By MARY HAMTAK
Deputy Clerk

April 28, 1973

[Filed: May 16, 1978]

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. K77-7 Misc.

UNITED STATES OF AMERICA and DAVID E. NOWAK,
Special Agent, Internal Revenue Service,
Petitioners,

v.

THE UPJOHN COMPANY and GERARD THOMAS,
Vice President, Secretary and General Counsel,
Respondents

ORDER AND FINAL JUDGMENT

May 16, 1978

This Court having considered the record in this case as developed before the Magistrate, and having issued an order on April 28, 1978, accepting the Magistrate's Report and Recommendation that the summons be enforced, it is now therefore

ORDERED that the respondents, The Upjohn Corporation and Gerard Thomas, on May *30th*, 1978, at 9:00 a.m. at the office of the Intelligence Division, Internal Revenue Service, Room B-47, Federal Building, 410 W. Michigan Avenue, Kalamazoo, Michigan, obey the summons served upon them on November 23, 1976, and each and every requirement thereof, by testifying and producing all of the books, records, papers and other data set forth in the summons and referred to in the Petition to Enforce Internal Revenue Service Summons.

/s/ NOEL P. FOX
Chief United States District Judge

DATED: 5/15/78
ILLEGIBLE
ILLEGIBLE
/s/ By G. E. LARRICK
Deputy Clerk

THE OPINION OF THE COURT OF APPEALS
IS REPRODUCED AT APPENDIX A
OF THE PETITION FOR CERTIORARI

SUPREME COURT OF THE UNITED STATES

No. 79-886

UPJOHN COMPANY, ET AL.,
Petitioners,

v.

UNITED STATES, ET AL.

ORDER ALLOWING CERTIORARI

Filed March 17, 1980

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted.